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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

SCOTT PAPER COMPANY, *Petitioner*,

v.

ELIGH WATKINS, *et al.*, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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v.

ELIGH WATKINS, *et al., Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Scott Paper Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on April 29, 1976.

OPINIONS BELOW

The opinion of the court of appeals is reported at 530 F.2d 1159 (5th Cir. 1976). The opinion of the District Court is reported at 6 Employment Practices Decisions ¶ 8912 (S.D. Ala. 1973). The opinions are reproduced as Appendices A and B, respectively, bound separately, and filed together with this Petition.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND EXECUTIVE ORDERS INVOLVED

Sections 703(a),(h) and (j), and 706(b),(f)(1) and (g) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2(a),(h) and (j), and 2000e-5(b),(f)(1) and (g), are set forth in Appendix C to this Petition. Executive Order 11,246, 30 Fed. Reg. 12319 (September 24, 1965), is set forth in Appendix D to this Petition. The Appendices are bound separately and filed together with this Petition.

QUESTION PRESENTED

Where an employer has attempted to eliminate the present effects of past discrimination by adopting a specific set of rules required by a Federal agency charged with enforcing equal employment laws, and where it is later held that those Government-sponsored rules do not comply with Title VII, would it frustrate the central statutory purposes of Title VII if a district court were permitted to consider the Government involvement and employer reliance in passing upon a claim for class-wide back pay?

STATEMENT OF THE CASE

Petitioner Scott Paper Company was a defendant in this action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Respondents, a class composed of all black employees at Scott's pulp and paper mill in Mobile, Alabama, were the plaintiffs. Co-defendants with Scott were the

labor unions that represented most hourly employees at the mill. (A. 1, 73-74)

Respondents did not contend at trial that the rules and procedures which governed transfers and promotions in hourly production jobs presently discriminate against Scott's black employees. Those rules and procedures were part of a seniority system that was neutral on its face.[1] (A. 2, 74-75)

The principal focus at trial, instead, was on a plan Scott adopted, at Government insistence, in 1968-69, to eliminate the present effects of pre-Act discrimination. The plan made several modifications in the transfer and promotion system in order to speed black employees to their "rightful place"—the job levels they could have attained had there never been racial discrimination at the mill—while still permitting safe and efficient mill operation. (A. 4-5, 75-76)

This plan reflected a new principle in Federal equal employment law, *viz.*, that an employer must not only abandon discriminatory practices and follow a neutral seniority system but must also adopt new seniority and other rules designed to eliminate continuing effects of the previous discrimination.

The affirmative action principle was first applied in the paper industry in March of 1968 in *United States* v. *Local 189*, 282 F. Supp. 39 (E.D. La.), a Title VII case brought by the Department of Justice and joined by private plaintiffs. The principle had been advanced

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[1] Indeed, Scott was cited in a 1969 study by the University of Pennsylvania's Wharton School as "a leader in minority integration in the industry" and as having "justly acquired the reputation as *the* place to apply for work in the Negro community." Northrup, THE NEGRO IN THE PAPER INDUSTRY, 110, 111 (1969) (emphasis in the original).

earlier by the Office of Federal Contract Compliance (OFCC), the agency in the Department of Labor responsible for overseeing compliance with Executive Orders that require affirmative-action promises from employers who contract with the Federal Government.[2] As stated by Under Secretary of Labor Laurence H. Silberman, "[t]he affirmative action obligation is a higher standard than mere passive nondiscrimination."[3] Previously, the Equal Employment Opportunity Commission (EEOC), the agency established by Title VII to oversee compliance with that law, had approved the establishment of a neutral seniority system upon the abolition of prior discriminatory practices.[4]

Promptly after the *Local 189* decision, OFCC began insisting that other Southern paper companies adopt the *Local 189* decree as the most appropriate balance between the objectives of eliminating present effects of past discrimination and preserving safe and efficient operation. International Paper Company, the South's largest, agreed at OFCC's insistence to a "Memorandum of Understanding" in August 1968. Scott had been notified in May 1968 that it must adopt a similar affirmative plan or face possible loss of Government contracts, and agreement on details was reached in November of that year. Thereafter, the union local which then represented all of Scott's black employees[5] ratified the Memorandum of Understanding. The then-white locals did not ratify the Memorandum (one voted it down), but Scott put it into effect in May 1969. (A. 89-90, 91-92)

The Memorandum identified, and gave special rights to, an "affected class" (ACs), consisting of all black employees hired on or before a specified date and all black employees hired after that date and initially placed in jobs or lines of progression that had formerly been all-black.[6] Of Scott's 500 black employees in 1969, only 300 were designated as ACs, and over one-third of these were already in jobs that had formerly been all-white. Thus, over 300 of Scott's 500 black employees were not, in 1969, in jobs from which blacks had historically been barred. (A. 91)

In its essence, the Memorandum contained the following plan for speeding ACs' progress while not endangering safe and efficient operation: On the one hand, ACs were to be entitled to transfer and receive promotions based on their mill seniority, instead of contract (job or department) seniority, in competing with non-ACs. On the other hand, Scott could continue to promote and transfer only qualified individuals, except that the qualifications needed by ACs to

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[2] The Executive Order then in effect was No. 11,246, adopted September 24, 1965. It has since been amended by Order 11,375. Order 11,246 transferred the functions previously exercised by the President's Committee on Equal Employment Opportunity to the Secretary of Labor, who in turn vested those functions in the OFCC. 30 Fed. Reg. 13,441 (Oct. 22, 1965). OFCC's regulations, which prescribe the appropriate form of contractual language and provide various enforcement details, are published in part 1-12.8 of 41 C.F.R.

[3] Hearings on S. 2515 *et al.* Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess. 81 (1971).

[4] Many of these background facts are taken from the opinion in Local 189 v. United States, 416 F.2d 980, 984 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970), in which the court of appeals affirmed the preliminary decree entered by the district court in March 1968. Meanwhile, the district court had entered a final decree. United States v. Local 189, 301 F. Supp. 906 (E.D. La. 1969).

[5] This local was later merged with the all-white locals.

[6] These had generally been the more menial, lower-paying jobs.

transfer into any line of progression in the Production Department were reduced to those of "employees working in the line who were hired at approximately the same time" as the AC applying for the transfer. (A. 4-5, 95)

Later in 1969, five black employees, respondents here, filed charges of racial discrimination against Scott at the EEOC. That agency took no action and at respondents' request issued a "right-to-sue" letter in May 1971.

This action followed. Respondents represent a class consisting of all black employees at the mill, of which there were 800 by the time of trial. They challenged the Memorandum as incorrectly conceived and contended further that it was inadequately implemented.[7]

After an extensive trial, the district court ruled against respondents on virtually every point. The court of appeals reversed on most of these points.[8] It overruled the district court's finding that the Memorandum was adequately understood by ACs and was correctly administered by Scott. It said, however, that this was "not . . . of decisive importance" because "even if correctly administered, the Memorandum would not have gone far enough to obviate further remedies . . . ." (A. 18) Critically, in addition to holding that other remedies were needed, the court of appeals also held that as a matter of law OFCC's involvement is not a reason to deny back pay to the plaintiff class. (A. 65)

[7] Respondents also challenged Scott's practices governing advancement to salaried supervisory positions as well as its educational and testing requirements for transfer into the Maintenance Department; the Memorandum did not address these questions.

[8] The EEOC appeared as amicus curiae, in support of respondents, in the court of appeals. (A. 1-2 n.3)

REASONS FOR GRANTING THE WRIT

Scott's position, though of profound and widespread importance in the administration of equal employment law, may be narrowly stated: Where a Federal agency has insisted that an employer adopt certain specific promotion and transfer rules in order to eliminate present effects of discriminatory employment practices the employer no longer follows, a district court, in a Title VII suit in which the new rules are successfully challenged, should be permitted to consider the Government involvement in passing upon a claim for class-wide back pay. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), held that the goal of speedily eradicating racial discrimination in employment is well served if courts normally award back pay, but this Court also held that in some cases an award need not be made, so long as the reasons would not frustrate the central statutory purposes of Title VII. The court of appeals held that Government sponsorship of the very rules that are held not to comply with Title VII is not such a case. Precisely the opposite is true. The court of appeals' holding would sharply reduce employers' incentive to follow, without litigation, Government-proposed remedies—directly contrary to the principle of *Albemarle.*

At the outset, we should make clear the arguments Scott is *not* making. First, Scott is not asserting that an employer who modified rules at the behest of the Government may never be required to change them *prospectively.* Second, Scott is not asserting that the Government action absolves the employer of back pay liability for periods *prior* to the action. Third, Scott is not asserting that Government action automatically precludes the imposition of back pay; instead, Scott challenges the court of appeals' holding that Govern-

ment action is totally irrelevant to whether back pay is awarded. Fourth, Scott is not asserting that Government action precludes an award of back pay to individuals who show that through no fault of theirs they could not benefit from the action.

There can be no doubt of the importance of the issue here presented. Conciliation of claims is the primary mechanism for enforcement of the Nation's equal employment laws and policies:

> (a) Former Undersecretary of Labor Silberman summarized the OFCC voluntary-compliance program as follows:
>
> "The threat of being declared a nonresponsive bidder, of being cancelled or debarred, is a powerful inducement to compliance . . . . We have found that the great majority of contractors have been willing to take all necessary steps to avoid these drastic sanctions." Hearings, *supra* n.3 at 79.[9]
>
> (b) The conciliation program is equally important to the EEOC. In 1971, the then-Chairman expressed disappointment that only half of the over 81,000 charges the Commission had received since 1965 had been settled by conciliation.[10] Yet that record reflects nearly 40,000 settlements—clearly a major element of equal employment opportunity enforcement.

[9] *See also* Note, *Civil Rights: Private Cause of Action Exists Under Title VII Notwithstanding EEOC Determination of No Reasonable Cause*, 1971 Duke L.J. 467, 477 (1971).

[10] Testimony of William H. Brown, reprinted in Legislative History of the Equal Employment Opportunity Act of 1972; Committee Print of the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. 930 (1972).

> (c) Other Federal agencies also have equal employment concerns. The Federal Communications Commission, for instance, has already adopted regulations explicitly dealing with the employment policies of its regulatees, and ratemaking agencies must now consider the consequences of equal employment issues as they affect the setting of rates.[11]

When Government agencies claim that employers' neutral seniority systems do not adequately eliminate the continuing effects of past discrimination, employers know that they must engage in "affirmative action" to erase those continuing effects. But there are few bright lines or rules that show what must be done at a given plant, mill or office to expedite the movement of black employees to their "rightful place." Moreover, as the court of appeals said in this very case, the rightful place theory is "an equitable accommodation" between countervailing interests. (A. 8)

It is obviously of public importance, in these circumstances, that employers be encouraged to reach a prompt "settlement" with the enforcement agency, rather than to litigate and have a court fashion, much later, the precise relief which best suits the situation at hand.

This conclusion also follows from this Court's holding in *Albemarle Paper Co.* v. *Moody, supra*, 422 U.S. at 417, that the availability of back pay relief provides the "incentive to shun practices of dubious legality"

[11] NAACP v. FPC, 48 L.Ed.2d 289 (1976). Those subject to rate regulation are precluded from attempting to pass on to their customers back pay awards based on findings of employment discrimination. *Id.* at 290.

and to eliminate, as far as possible and without protracted litigation, all traces of past discrimination.

Scott has done precisely what the law encourages. When the OFCC asserted in 1968 that Scott's prior elimination of discriminatory practices was not adequate to discharge its responsibilities, Scott accepted a new set of rules, tailored to the paper industry, *that OFCC put forward*. Scott had every reason to believe that it need not fear an award of class-wide back pay based on following these far-reaching rules, particularly after the new rules were ratified by the very class of employees for whose benefit they were expressly designed. Indeed, EEOC urges employers to adopt and implement effective affirmative action plans "before the Federal Government is called in, with the prospect of costly litigation, back pay awards, and court-imposed goals, timetables and changes in employment practices." [12]

But under the decision below these reasonable expectations are not to be fulfilled.

According to the court of appeals, "the question is whether Scott has done enough." The court held that "enough" under Title VII means "everything that is possible . . . limited only by the most compelling business reasons." (A. 9) The court ruled that the plan set forth in the Memorandum was not a proper "equitable accommodation" between eliminating present effects of past discrimination and preserving safe and efficient operation of the mill. For example, in considering the seniority rule to apply when two ACs and a non-AC compete to fill a vacancy, the court acknowledged that "no system could be devised that was totally devoid of eccentricity" but said it preferred the approach suggested by respondents—although that approach was "not without its peculiarities"—to the approach followed by Scott under the Memorandum. (A. 24) Similarly, the Memorandum allows Scott to consider the qualifications of ACs seeking a transfer to a different type of job, as compared with non-ACs already in the job (pp. 5-6, *supra*), but the court of appeals ruled that different levels of education could not be considered even though they might be pertinent to the issue of qualifications. (A. 25-26, 28, 39-40)

[12] EEOC, "Affirmative Action and Equal Employment—A guidebook for employers" at p. 12 (1974).

Of critical importance is the fact that the court of appeals did not rule merely that Scott must change its transfer and promotion rules prospectively; it went on to hold that Scott is liable for class-wide back pay as a result of compliance with the unsatisfactory rules and that OFCC's responsibility for the formulation of these rules was completely immaterial to the back pay question. It is this latter point that Scott challenges in this Court. The court of appeals, by allowing the district court to accord no weight to the Government involvement, has misconstrued an important Federal statute and, more particularly, has applied this Court's decision in *Albemarle* in a seriously erroneous fashion.

Scott makes no claim that its "good faith" should be accepted as a defense. The point is instead that the OFCC (and black union) involvement at least "opens the door to equity." *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 422. It is permissible for a court, in its discretion, to deny back pay "for reasons which, if applied generally, would not frustrate the central

statutory purposes [of Title VII]," *id.* at 421.[13] Here a Federal agency charged with enforcing anti-discrimination laws has imposed a specific remedial plan to eliminate present effects of past discrimination, and those who had been subject to the past discrimination have knowingly and voluntarily consented to that plan. Even if it is later decided that more far-reaching changes should be made in work rules, it is Scott's position that, in *Albemarle's* words, the "central statutory purposes" of Title VII would not be frustrated if a district court were free to decide not to award back pay in such a case and that indeed the opposite is true.

Suppose that Scott had resisted the OFCC plan in 1968. It would have been open to OFCC to initiate enforcement proceedings or to refer the matter to the Department of Justice or the EEOC. Executive Order 11,246, Sec. 209. Such a step could have resulted in a court decree imposing the OFCC plan upon Scott. If so, it would be difficult to contend that the decree would be of no relevance in determining whether back pay should be awarded to the entire class of black employees—intended beneficiaries of the decree—for the period that postdated the decree if a court should later hold that the decree should be altered in a number of respects. Yet the holding below is that if the employer promptly accepts the Government-proposed plan, saving time and money for all, the plan is *immaterial* to the back pay question. It is difficult to conceive of a

[13] Similar issues are now before this Court in U.S. Steel Corp. v. Ford, No. 75-1475 and United Steelworkers of America v. Ford, No. 75-1478, petitions for certiorari filed April 13, 1976; ruling below: 520 F.2d 1043 (5th Cir. 1975).

ruling more likely to undermine non-litigative enforcement activity.

The position Scott advances here is supported, not undercut, by this Court's decision in *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974). There the Court held that "an individual does not forfeit his private cause of action [under Title VII] if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement." *Id.* at 49. The Court said that "mere resort to the arbitral forum to enforce contractual rights" is not a waiver of the right to assert the same claims in a Federal court because Title VII rights may not be waived or bargained away "as part of the economic bargain struck with the employer." *Id.* at 52.

Here we are not dealing with a waiver or bargaining away of rights. The OFCC plan was not a trade-off in the give and take of collective bargaining. Instead, it was just the type of "voluntary settlement" by the class of black employees that *Alexander* expressly assumed would be permissible. *Id.* at 52. Nor is the OFCC plan asserted as a bar to any claim, nor as a bar to any remedy. The question here is what weight, if any, is to be accorded the OFCC and black union involvement in choosing the appropriate Title VII remedies. The court of appeals' answer was "none." In *Alexander,* this court indicated that the answer should vary with the facts of the case, but that "great weight" should be accorded the prior determination where it "gives full consideration to an employee's Title VII rights." 415 U.S. at 60, n.21. Where, as here, the employees' Title VII rights were

the sole focus of the agreement, that agreement, under *Alexander,* merits substantially more weight than the court of appeals chose to give it.

Finally, reversing the decision below on the ground advanced herein would profoundly affect the outcome of the case upon remand to the district court, whether or not the court of appeals' findings that Scott did not adequately communicate the terms of the Memorandum to affected employees and that it did not properly implement the Memorandum are allowed to stand.[14] Such profound effects flow inevitably from the opinion of the court below, which itself stated that "even if correctly administered, the Memorandum would not have gone far enough to obviate further remedies." (A. 18) Moreover, such matters as whether particular employees understood their rights and whether Scott properly implemented the Memorandum in specific situations might give rise to individual back pay claims in particular instances but not to back pay relief to the entire class (which includes many ACs who fully understood their rights and promptly exercised them).

[14] Scott vigorously disagrees with these appellate findings. As for communication, for example, the district court's finding in Scott's favor is based upon the express testimony of the president of the black union that the terms of the Memorandum were communicated to the AC in a series of individual interviews (A. 99-100); the court of appeals reversed this finding and relied on testimony by several ACs that they did not understand all of the Memorandum's terms.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 74-1001

Eligh WATKINS et al., Individually and on behalf of other persons similarly situated, Plaintiffs-Appellants-Cross Appellees,

v.

SCOTT PAPER COMPANY et al.,
Defendants-Appellees-Cross-Appellants.

April 29, 1976

Before WISDOM, GEWIN and AINSWORTH, Circuit Judges.

WISDOM, Circuit Judge:

This case presents, once again, the difficulties inherent in an employer's obligation to comply with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, by undoing the effects of past racial discrimination in employment.

Five named plaintiffs brought this suit as a class action on behalf of an "affected class" of black employees at the Mobile, Alabama pulp and paper mill of Scott Paper Company (Scott).[1] The defendants are Scott, the United Paperworkers International Union (UPIU), and UPIU Locals 421, 423, 575 and 873. After a lengthy trial, the district court ruled for the defendants on almost all issues.[2] On appeal,[3] we reverse.

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[1] The action was allowed to proceed as class action with the class defined as all blacks employed at Scott's Mobile, Alabama facility at the commencement of this cause, all present black employees hired since that date, and all future black employees, excluding unsuccessful job applicants.

[2] *See Watkins v. Scott Paper Co.*, S.D.Ala. 1973, 6 Fair Employment Practice Cases (FEPC) 511.

[3] The Equal Employment Opportunity Commission, the agency established by Congress to administer, interpret, and enforce Title VII, filed a brief as *amicus curiae* in support of plaintiffs-appellants directed to the issues of the district court's failure to order complete injunctive relief to eliminate present discrimination and

I. The Facts

Scott purchased the pulp and paper mill in 1954. As of June 1972, 3,440 employees worked at the plant, which transforms wood into assorted types of paper products. The mill is organized into Production and Maintenance Departments. From the wage earners' perspective, the higher-paying, skilled craft jobs (welders, pipefitters, machinists, carpenters, sheet metal workers, brick masons, and painters) in the Maintenance Department are more desirable than the jobs in the Production Department. Within each department, jobs are functionally divided into lines of progression, or groups of related jobs in which an employee moves from lower-paying to higher-paying and more responsible jobs.

From the time the mill began operating in 1940, until 1963, job opportunities were segregated on the basis of race. Black employees were channeled into lower paying, more physically demanding jobs. For example, blacks were prohibited from working on crews that operated the paper machines, excluded from training opportunities in the Maintenance Department, and precluded from entering the line of progression that would have enabled them to advance to jobs such as "crane operator" and "woodroom yard operator." Instead, blacks were limited to such jobs as "laborer." This system of job segregation was reinforced by union policy of maintaining segregated locals. The economic impact of this discrimination was, of course, substantial. As of June 1, 1972, the average rate of pay of affected class members was about $0.47 an hour less than the average for whites. More importantly, a comparison of

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the effects of admitted past discrimination; its failure to order the elimination of the Company's tests for maintenance positions which disproportionately disadvantage blacks and are not valid under appropriate legal standards; and its failure to provide back pay to compensate the victims of such discrimination for their resulting economic losses. The Commission stated in its brief that "Resolution of these issues are of general importance to the interpretation and enforcement of Title VII".

average wage rates between members of the affected class and their white "contemporaries" hired between 1940 and 1954 shows that the average differential was more than $1.00 an hour.[4]

Scott does not deny that discrimination existed. It asserts, however, that it wanted to integrate its work force as early as 1955, that it then pledged to do so, probably in response to presidential executive orders.[5] Scott says that it could not do so "rapidly . . . in view of then-prevailing attitudes". In 1961 Scott announced that no job would be barred to any employee or applicant because of race. Despite this apparent compliance with its 1955 pledge, no blacks began to work in formerly all-white jobs. Only in 1963, after Scott placed four blacks into previous white jobs, did the pattern of strict segregation begin to fade. Although about one-third of the affected class members had transferred to previously all-white jobs by 1968, the majority had not.

The probable reason for the failure of more affected class members to transfer is that in 1963, when the white lines of progression in the production department were

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[4] The relevance of interracial wage comparisons in Title VII cases is evidenced by our discussion in *Baxter* v. *Savannah Sugar Ref. Corp.*, 5 Cir. 1974, 495 F.2d 437.

[5] In 1951, by Executive Order 10308, President Truman established the President's Committee on Government Contract Compliance to study and make more effective the nondiscrimination clause in government contracts. In 1953, by E.O. 10479, President Eisenhower established the President's Committee on Government Contracts which was authorized to receive complaints of violations of the clause, transmit the complaints to the contracting agencies, and oversee agency action with respect to handling complaints. *See also* E.O. No. 10925, 3 C.F.R., 1959-1963 Comp., at 448. In 1965 President Johnson's E.O. 11246 vested enforcement authority in the Secretary of Labor, *see* C.F.R., 1964-1965 Comp., at 339, who delegated such authority to the Office of Federal Contract Compliance. See the Federal Civil Rights Enforcement Effort—1974 (1975), at 230-33.

"opened" to the class, Scott imposed a high school education requirement for transfers between lines of progression.[6] This requirement served to lock many affected class members into their inferior, black jobs.[7] Scott also imposed upon would-be transferors in 1963 the requirement that they achieve a passing score on the Kopas Aptitude Test. Finally, an age limit on transferors further hindered Scott's efforts to comply with its 1955 pledge to provide equal employment opportunities. The result of the various limitations upon transfer was that, by May 1969, only seven black employees hired before 1963 had transferred into formerly white lines of progression.

At that time, however, the so-called Memorandum of Understanding went into effect.[8] The negotiated Memorandum was a result of the efforts of the Department of Labor's Office of Federal Contract Compliance (OFCC) to bring Scott into line with Executive Order 11246. It

[6] Since 1958, Scott had required a high school diploma for all whites being hired by the mill. The same entrance criterion was imposed upon blacks in 1963, when Scott began to hire them into traditionally white lines of progression. From 1958 to 1963, however, there were no educational requirements for transfer between lines of progression.

[7] Of the black employees hired before 1958 and still working as of June 1, 1972, 83 had no high school diploma or equivalent. Of the black employees hired between 1958 and 1963 and still working as of June 1, 1972, between 44 and 46 had no high school diploma or equivalent. Finally, of the 173 black employees hired before 1964 who were working as of June 1, 1972, 129, or 75%, did not have a high school diploma or equivalent.

[8] The defendants used International Paper Company's "Jackson Memorandum" as a basis for drafting Scott's "Memorandum of Understanding". The Jackson Memorandum, an agreeement between International Paper Company's Southern Kraft Division and the several unions representing its hourly wage employees, became effective August 11, 1968, and is a primary subject of the *Stevenson* litigation. *See Stevenson* v. *International Paper Co.*, 5 Cir. 1975, 516 F.2d 103.

provided, among other things, that affected class members could transfer into formerly white lines of progression with "[Q]ualification requirements . . . no higher for any employee than for employees working in the line who were hired at approximately the same time". The Memorandum allowed affected class members to compete within formerly white lines of progression on the basis of their mill seniority, thus seeming to comport with the Title VII remedies afforded in such cases as *Local 189, United Papermakers and Paperworkers* v. *United States*, 5 Cir. 1969, 416 F.2d 980, *cert. denied*, 1970, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed. 2d 100. The plaintiffs, however, contended that the Memorandum was inadequate in itself and, in any event, was inadequately put into effect. The specifics of this contention, with additional facts, are set forth below.

In addition to the affected class complaining against discrimination with respect to transfer opportunities within Scott's mill, the plaintiffs sued to enjoin the alleged discriminatory operation of Scott's system of transfers into the Maintenance Department. Scott imposed upon such transfers the high school diploma requirement and the Kopas Aptitude Test requirement in 1963, as it did for transfers within the Production Department. In 1968, Scott switched to the Wonderlic Test at the OFCC's suggestion, but retained and still retains the diploma requirement. In 1970, Scott again switched tests, this time to a battery—the Scott Battery—that had been "validated"[9] by an expert industrial psychologist.[10] The plaintiffs contended that these requirements have a significant discriminatory

[9] The Bennett Mechanical Comprehension, Purdue Non-Language, and Perceptual Speed Tests are referred to collectively as the "Scott Battery".

[10] The expert was, coincidentally, Dr. William Scott, an Associate Professor of Personnel and Organizational Behavior at the Graduate School of Business at Indiana University. The Scott Battery draws its name from Dr. Scott, rather than from the Scott Paper Company.

impact on blacks, and that Scott had not shown these tests to be sufficiently job-related to justify their use.

The plaintiffs also alleged that Scott's system of selecting salaried supervisors discriminates against blacks. Although there is no assertion that Scott intended to discriminate, the appellants contend that the appointment procedure, which relies heavily upon the recommendations of front-line supervisors based on allegedly "vague and elusive" standards, is inherently discriminatory.

Finally, the plaintiffs class claimed an award of back pay, regardless of Scott's good faith.

One of the plaintiffs, Will Robinson, charged Scott with firing him because of his race.

II. The Litigation Below

The district court found for Scott and the defndant unions on virtually every contested point. In an extensive opinion, relying heavily upon the defendants' post-trial brief, the district court found that the Memorandum of Understanding, as carried out by the defendant Scott, "successfully assured the affected class members that their opportunities for advancement at Scott would in no way be limited by any continuing effect of past discrimination". The court held that "general statistical information" was not relevant, nor was information showing how many affected class members had actually taken advantage of the opportunities offered them, when the employer had provided new opportunities that were "legally adequate".

The district court found that the statistics the plaintiffs produced, showing the difference in test scores and passing rates between blacks and whites in competition for Maintenance Department jobs, were too insubstantial to show that the tests had an adverse impact on blacks. The court found, however, that even if there was an adverse impact, the tests were lawful for the defendant's expert had adequately demonstrated the job-relation of the Scott Battery.

The district court found that Scott did not discriminate against blacks in supervisor selection. The court found that first-line superiors did not have the ability to control who was selected for supervisory jobs, and the court approved the qualifications Scott requires of candidates for such positions, as required by business necessity.

As a result of these findings and the additional fact that Scott had not intended to discriminate and had acted all along in good faith and with the purpose of promoting equal employment opportunities, the district court denied back pay to the plaintiff class.[11]

Finally, the court held that the action taken by Scott against Will Robinson was justified by "repeated instances of negligent work performance."

III. Production Department—Interpretation of the Memorandum of Understanding

A. *General Remarks*

In *Johnson* v. *Goodyear Tire & Rubber Co.*, 5 Cir. 1974, 491 F.2d 1364, 1367, we observed that "federal remedial legislation has created *a right of action ensuring that a discriminatee may be made whole for an employer's misconduct*" (emphasis added). Accordingly, we have condemned "neutral practices of . . . departmental seniority system[s] and . . . posting and bidding procedure[s that] carry forward into the present the stratification of black employees into lower paying, non-skill[ed] departments and jobs resulting from past discrimination." *Pettway* v.

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[11] The defendants cross-appealed from that part of the district court's judgment that awarded attorneys' fees to the plaintiffs. See Part IX *infra*. There was also a cross-appeal from part of the judgment that varied from the defendants' post-trial brief in granting to blacks hired between 1958 and 1963 the right to transfer to any line of progression in the production department, regardless of the formal educational level attained. 6 FEPC at 546; see note 26 *infra*.

American Cast Iron Pipe Co., 5 Cir. 1974, 494 F.2d 211, 236. The rule, adopted by this Court in *Local 189, United Papermakers and Paperworkers* v. *United States*, 5 Cir. 1969, 416 F.2d 980, 988, and recently endorsed by the Supreme Court in *Franks* v. *Bowman*, 1976, —— U.S. ——, ——, —— & n. 41, 96 S.Ct. 1251, 1265, 1271, 47 L.Ed. 2d. ——, ——, ——, 44 U.S.L.W. 4356, 4362, 4365 & n. 41, is that blacks previously discriminated against must be given such remedial relief as to enable them to achieve their "rightful place" in an employer's employment hierarchy. The rightful place theory is an equitable accommodation between two countervailing interests. The first interest is that of prior discriminatees to achieve what would have been theirs in the absence of discrimination. The countervailing interests are those of employers, employees, and consumers—in maintaining safety and efficiency—and those of employees who acquired their positions within the discriminating system and who would suffer unfairly if required to give up such positions to members of an affected class. See *Patterson* v. *American Tobacco Company*, 4 Cir. 1976, —— F.2d —— (1976).[12]

As we stated in *Local 189*. "[t]he crux of the problem is how far the employer must go to undo the effects of past discrimination". Local 189, 416 F.2d at 988. The answer is simply that the employer must go as far as he can "unless there is an overriding legitimate, nonracial business purpose". This overriding purpose can only be a purpose necessary to the safety or efficiency of a business enterprise. *United States* v. *Jacksonville Terminal Co.*, 5 Cir. 1971, 451 F.2d 418, 451, *cert. denied*, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815. We observed that

> the "business necessity" doctrine must [do] . . . more than . . . serve legitimate management functions. Otherwise, all but the most blatantly discriminatory plans would be excused even if they perpetuated the effects of past discrimination. . . . *Necessity connotes an irristible demand.* To be preserved, [a present employment practice] . . . must not only directly foster safety and efficiency of a plant, but also be essential to those goals. . . . If the legitimate ends of safety and efficiency can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued.

[12] *See generally* Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 Harv.L.Rev. 1260, 1268-75 (1967) (effect of Civil Rights Act upon established seniority rights).

Id., quoting United States v. *Bethlehem Steel Corp.*, 2 Cir. 1971, 446 F.2d 652, 662 (bracketed material and emphasis added). See also *Rodriquez* v. *East Texas Motor Freight*, 5 Cir. 1974, 505 F.2d 40, 56 (quoting *Bethlehem Steel*), *appeal pending*.

These principles have been applied time and again to strike down an employment practice that seemed neutral on its face. Here, the company's policies might seem to some not only neutral, but favorable to prior discriminatees. But the fact that Scott has made earnest efforts to eliminate the traces of its prior conduct should not obscure the real issue before us. The question is not whether the opportunities afforded by Scott were "ample" in the sense that they substantially reduced the effects of prior discrimination. The question is whether Scott has done enough. And "enough" means, for the purposes of Title VII, everything that is possible. This realm of possibility should be limited only by the most compelling business reasons. If the business can function safely and efficiently after the imposition of remedial relief, it must be subject to such remedial relief.

The appellants argue that four aspects of Scott's actions have, unnecessarily, restricted the full enjoyment of Title VII rights by the affected class. First, they contend that the affected class members were not adequately in-

formed of their rights under the Memorandum of Understanding. Second, the appellants urge that Scott's interpretation of the Memorandum, insofar as it enables junior non-affected class members to move up in lines of progression ahead of senior affected class members, due to the presence of a "blocking" affected class member, severely retards the advancement of some affected class members to their rightful places. Third, they contend that by forcing affected class members to accept a cut in pay in some cases in order to transfer to a formerly all-white line of progression, Scott impedes progress to the rightful places. Finally, the appellants contend that the educational requirements imposed upon affected class members desiring to transfer to formerly all-white lines of progression are arbitrary and continue the effects of prior discrimination, in that their white contemporaries were not subject to the same educational requirements and that those educational requirements are not now justified by any business necessity. We reverse the district court's decision on each of these issues.

B. *Carrying Out the Provisions of the Memorandum*

The appellants contend that "[b]ecause the affected class was not fully informed about its meaning and therefore had little access to its 'opportunities,' the Memorandum of Understanding was a useless gesture". The overwhelming evidence adduced at trial supports this contention.

There were numerous flaws with Scott's attempt, through brief interviews with most affected class members, to inform the affected class of its rights under the Memorandum. First, at the time of the interviews, it appears that neither of the interviewers—Giffen, Scott's chief personnel officer, and Moore, an affected class member himself and a representative of the black local union—understood, or, if they understood, attempted to convey Scott's complex interpretation of the qualification requirements provision of the Memorandum. This provision stated:

> Qualification requirements for transfer to any line of progression or for advancement in the line, will be no higher for any employee than for employees working in the line who were hired at approximately the same time.

Scott interpreted this to mean that, although a high school diploma would not be required in every line, an affected class member had to have the same level of formal education as the least educated white in the line of progression to which the affected class member wanted to transfer. The result was, as might be expected, that different lines of progression posed different formal educational barriers to transfer. For example, transfer to the Tissue Traffic line of progression required a fifth grade education; but transfer to the Tissue Shipping line of progression required a seventh grade education, and transfer to the Tissue Finishing line of progression required a tenth grade education. Notwithstanding the "least educated white man" rule and the language of the Memorandum, Scott retained high school requirements on transfer to certain lines of progression on the grounds that they involved special safety considerations or were otherwise required to be competently staffed. For example, a diploma was necessary for transfer to the Recovery Room, although a white incumbent there had only a sixth grade education.

It is obvious that an affected class member would not know to which formerly white jobs he could transfer unless a document were published containing the relevant information, or unless he were told, job by job. Yet no such document was published, and the evidence convincingly demonstrates that the affected class members were not told the details of Scott's special transfer system. Not only were affected class members not informed about educational requirements which still obtained, but some affected class members did not realize that *any* educational requirements had been *dropped*.

A serious problem with Scott's use of the Memorandum was its treatment of the automatic consideration provision. Ordinarily, an employee wishing to transfer to another line of progression had to keep himself informed about vacancies as they were posted on bulletin boards around the plant; if he were interested in a particular vacancy, he had to sign for it on a list in the personnel office. The Memorandum provided, however, that affected class members would automatically be considered for transfers

> unless, after full explanation of their opportunities for transfer and future advancement, they elect not to be so considered and sign a waiver to that effect. This waiver can be revoked at any time at the written request of the employee.

Of the 273 affected class members who were interviewed by Giffen and Moore, 193 signed the top part of a two-part form, which reads:

> I have had explained to me and understand recent changes agreed to between the Company and the Unions which may provide me with opportunities, not provided by the basic Labor Agreement, for transfer to other jobs and future advancement in lines of progression.

These 193 were then deemed by Scott to have waived their rights to automatic consideration for transfer. Another 68 affected class members signed the bottom of the form, which reads:

> I wish to be automatically considered for all openings in jobs and lines of progression listed below and waive my rights for automatic consideration under the terms of the specal agreement referred to above for all other jobs. I understand that I may withdraw this waiver as to future openings at any time by giving written notice to the Company.

These 68 listed one or more jobs or lines of progression for which they wished to be automatically considered. Twelve affected class members refused to sign either portion of the form.

Scott candidly admits that "[t]he point of the interviews was *not* to engage in a lengthy, theoretical discussion of the Memorandum's terms". "Instead, it was to translate the abstract into the specific, to find out which [affected class members] were interested in pursuing the opportunity to transfer to other lines of progression". Scott then contends that, by signing the top part of the form, affected class members indicated that they "did not wish automatic consideration for any transfers". For this sub-class of the affected class, Scott argues that further explanations were unnecessary.

We observe that the first paragraph speaks only in terms of "understanding", not in terms of "waiver", or "giving up", or "losing opportunities provided by a recent agreement negotiated with the purpose of affording you your rights". There is a world of difference between what the "waiver" actually says and the effect it had as interpreted by Scott. One may express an understanding of one's rights without, at the same time, agreeing to waive them. Thus, contrary to Scott's argument, it is not at all clear that these 193 affected class members were afforded the "one bona fide opportunity" the law requires. See *United States* v. *Hayes International Corp.*, 5 Cir. 1972, 456 F.2d 112, 119. Moreover, accepting for the moment the appellants' version of the interviews, Scott's approach was to ascertain whether the interviewee was "satisfied" with his present job. If so, he was asked to sign the top part of the form. Yet one may be satisfied with one's job, but desire to transfer to a better job if and when the opportunity presents itself.[13]

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[13] *See Peters* v. *Jefferson Chemical Co.*, 5 Cir. 1975, 516 F.2d 447, 451, where, in a Title VII sex discrimination case, we ob-

We also note that, by indicating interest in automatic consideration for some jobs, affected class members were forced to waive automatic consideration for all other jobs. The average affected class member might not know, at the time of his interview, what vacancies might occur or in what lines of progression he would be interested in the future.[14] Of course, an affected class member could always revoke his waiver or sign up, as other employees are required, for vacancies as they are posted. But the gist of the automatic consideration procedure is to relieve affected class members of most of the responsibility for regaining opportunities initially denied them by their employer. The importance of the automatic consideration procedure is evident here. A number of affected class members, believing either that posted educational requirements applied to them or that some lines of progression were still closed to blacks, failed to sign up for posted vacancies after having "waived" their rights to automatic consideration. Despite these problems, the district court found the waiver approach reasonable and lawful because automatic consideration of every affected class member for every job would have created a "staggering" burden for Scott. 6 FEPC at 525.

We see merit in Scott's contention that not *every* affected class member should be considered for *every* opening in a formerly white line. We fail to see that the use of a waiver form, the tendency of which is to cause most af-

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served that an employee may express "satisfaction" with her job in order not to antagonize a supervisor, yet still desire to transfer to another job.

[14] We do not mean to imply that remedial transfer rights are to remain in effect indefinitely. We have held that the rightful place doctrine requires only "one bona fide opportunity", *United States* v. *Hayes International Corp.*, 5 Cir. 1972, 456 F.2d 112, 119. In *Hayes*, however, the affected class members were adequately informed about job qualifications and that there was no "waiver" form similar to the one used by Scott.

fected class members to be automatically considered for a small number of jobs, is justified by business necessity. To be sure, there was evidence showing that the personnel department's task of filling job vacancies took a great deal of time. But there is no evidence showing that the procedure suggested by the appellants would take up substantially more time. One effect of automatic consideration, of course, would be the compilation of a longer list of employees from which a job vacancy would be filled. But in both the present procedure and the suggested procedure, most time is or would be spent, not in compiling the list, but in interviewing in order of seniority, the highest person on the list and attempting to fill the vacancy with that person. Although it may seem probable that employees who have not specifically applied for a job are less likely to accept it, if it were offered, than employees that have bid for it, there is no evidence that this is the case.[15]

Second, even if non-bidding affected class members are more likely to refuse transfer, there are means by which the district court could have reduced the burden on Scott. Refusal of a job in a particular line of progression could, for example, be deemed a specific waiver of automatic consideration in that line.[16]

Finally, even if automatic consideration imposed a substantial burden on Scott, the business necessity test is not necessarily satisfied. By the expenditure of funds and the hiring of a larger personnel staff, Scott could decrease the

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[15] The district court's observation about materiality was correct. It was Scott's burden, not the plaintiff's to show how the automatic consideration procedure would destroy efficiency and safety. Giffen's patently believable testimony that three hundred affected class members would have to be interviewed for every vacancy does not carry this burden.

[16] *See, e.g., United States* v. *Hayes International Corp.*, 5 Cir. 1972, 456 F.2d 112, 116; note 14 *supra*.

time it takes to reach senior employees and, more importantly, decrease the number of rejected offers by educating affected class members about the nature of different lines of progression before allowing them to waive specific transfer rights. See *Bowe* v. *Colgate, Palmolive Co.*, 7 Cir. 1973, 489 F.2d 896, 900.

The inadequacies of the waiver forms might not weigh so heavily were it not for the failure of Scott adequately to explain to the interviewees their rights under the Memorandum. We consider the district court's finding to the contrary to be "clearly erroneous".

First, the district court accepted the testimony of Giffen and Moore, to the effect that the Memorandum's terms had been fully explained, over the overwhelming testimony of the interviewees that they were not told about the variegated educational requirements, that they were not informed about the right to automatic consideration, and that they did not realize they were signing a waiver. Indeed, the court was so convinced that each interviewee was going to testify in the same general manner that it requested during trial that plaintiffs' counsel not belabor the point. The district court said that it had been

> adequately educated on the fact that the majority if not all of the members of the affected class either did not understand or did not have adequately explained to them the effects of the Memorandum . . . .

Plaintiffs' counsel remarked that, by dispensing with cumulative testimony about the nature of the interviews, the court would be impairing its ability to evaluate the pervasiveness of Scott's failures. Nevertheless, except for occasional instances where a witness was asked about specific interview incidents not already covered, the interviewee-witnesses' testimony about the failure of Giffin and Moore to explain the Memorandum was briefly summarized by counsel in a repeated "proffer".

A trial judge has discretion in eliminating cumulative testimony, but here the court's cutting off testimony on this key issue deprived it of an opportunity to be persuaded to the plaintiffs' view of the facts. Its findings are entitled, therefore, to less weight than they would be had each witness, or a large number of witnesses, testified fully as to the interview."

The district court articulated two major reasons for disbelieving the interviewees. First, it relied on the fact that 193 interviewees signed the "understanding" section of the waiver form. This, of course, begs the question. The plaintiffs' theory is that the forms were *signed* without understanding. To assume that, notwithstanding strong evidence to the contrary, a signature implies understanding is to allow a rule of contract law to play too salient a part in the administration of a remedial civil rights statute. Cf. *Alexander* v. *Gardner-Denver Co.*, 1974, 415 U.S. 36, 51-52, 94 S.Ct. 1011, 1021-1022, 39 L.Ed.2d 147, 159-160 (Title VII rights are not waived by an employee's resort to arbitration of a claim under a nondiscrimination clause of a collective bargaining agreement).

The second reason the district court assigned for discrediting the interviewees is that the "witnesses who testified that the Memorandum was not explained to them also testified on cross-examination of their falsification of their job applications. The justification for their falsification was as repetitious as a stuck record". 6 FEPC at 525. The

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" F.R.Civ.P. 52(a) provides that "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses". Where findings do not rely upon the credibility of witnesses, the force of the clearly erroneous doctrine is mitigated. *See, e.g., United States* v. *Stringfellow*, 5 Cir. 1969, 414 F.2d 696, 699; *A. J. Indus. Inc.* v. *Dayton Steel Foundry Co.*, 6 Cir. 1968, 394 F.2d 357, 361-62; *United States* v. *United Steelworkers of America*, 3 Cir. 1959, 271 F.2d 676, 685, *aff'd*, 361 U.S. 39, 80 S.Ct. 1, 4 L.Ed.2d 12; *Lamb* v. *ICC*, 10 Cir. 1958, 259 F.2d 358, 360.

district court did not cite specific testimony, however, and the record contains only one instance of an employee admitting that he knowingly falsified an employment application.[18]

The court's findings on the issue of waiver cannot be examined in a vacuum. A waiver of a federal remedial right is not lightly to be inferred,[19] and the issue must be looked at in the context of the racial discrimination which, for most of its existence, has characterized the mill's operation. Because we hold that, even if correctly administered, the Memorandum would not have gone far enough to obviate further remedies, the issue is not one of decisive importance. The substantive failures of the Memorandum, however, are more easily understood in light of the method by which Scott attempted to put it into effect. Cf. *Rogers* v. *International Paper Co.*, 8 Cir. 1975, 510 F.2d 1340, 1345

[18] One affected class member testified that he did not indicate, on his initial employment application, his high school education. The asserted reason for this failure was the employee's fear that Scott would discriminate against educated blacks.

[19] In *Alexander* v. *Gardner-Denver Co.*, 1974, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147, the Supreme Court held that an employee did not waive Title VII rights by first submitting a claim of discrimination to arbitration under a collective bargaining agreement. To be sure, the Court recognized that it was possible for an individual employee to waive Title VII rights as part of a voluntary settlement. *Id.* at 52 & n. 15, 94 S.Ct. at 1021, 39 L.Ed.2d at 160; *see United States* v. *Allegheny-Ludlum Indus., Inc.*, N.D.Ala. 1974, 63 F.R.D. 1, 7, *aff'd*, 5 Cir. 1975, 517 F.2d 826. Nonetheless, the Supreme Court observed that there was no voluntary settlement "expressly conditioned on a waiver" of the employee's Title VII cause of action. 415 U.S. at 52 n. 15, 94 S.Ct. at 1021, 39 L.Ed.2d at 160. This observation impliedly requires a degree of specificity in Scott's waiver form, if that form is to have the effect Scott desires, that does not exist. Moreover, the Court also observed that the mere existence of an express waiver would be, of itself, insufficient to show actual waiver. In addition, it would be necessary to show, *"at the outset"*, that the waiver was "voluntary and knowing". *Id.* (emphasis added).

(passive and minimal recrutment efforts may justify finding of discriminatory conduct).

C. *Red Circling*

The Memorandum of Understanding provided, with one limitation, that members of the affected class could transfer to jobs in formerly all-white lines of progression without sacrificing any wages. This device, commonly known as "red circling", has been required by many courts in their attempts to remove all factors that would force affected class members seeking to achieve their rightful places "to pay a price for those opportunities".[20] The rationale behind red circling is obvious. Had members of the affected class not been discriminated against, they would have had no need to transfer into formerly all-white lines of progression to qualify eventually for high paying jobs. A remedial program that allows blacks to transfer into formerly white lines but forces them to accept a temporary cut in pay is not an effective way of providing affected class members their rightful places. To the extent that the Memorandum requires red circling, then, it is in accordance with obvious and uncontroverted legal and practical requirements.

The Memorandum of Understanding, however, set a limit on red circling. A transferee to a formerly all-white line of progression would retain his previously higher wage, but only up to $3 an hour. Two weeks after the

[20] *Long* v. *Georgia Kraft Co.*, 5 Cir. 1971, 450 F.2d 557, 560; *see, e.g., Pettway* v. *American Cast Iron Pipe Co.*, 5 Cir. 1974, 494 F.2d 211, 248; *Rogers* v. *International Paper Co.*, 8 Cir. 1975, 510 F.2d 1340, 1355-56; *United States* v. *Bethlehem Steel Corp.*, 2 Cir. 1971, 446 F.2d 652, 659; *United States* v. *N. L. Industries, Inc.*, 8 Cir. 1973, 479 F.2d 354, 375-76; *Hicks* v. *Crown Zellerbach Corp.*, E.D.La. 1970, 319 F.Supp. 314, 324-25; *Clark* v. *American Marine Corp.*, E.D.La. 1969, 304 F.Supp. 603, 608; *Robinson* v. *Lorillard Corp.*, M.D.N.C. 1970, 319 F.Supp. 835, 842, *aff'd*, 4 Cir. 1971, 444 F.2d 791.

Memorandum went into effect, a general pay raise at Scott's Mobile mill put most black jobs over the $3 limit. Therefore, although the Memorandum was to remain in effect for two years, the red circling provision was, for practical purposes, in effect for only two weeks.

Despite these facts, the district court found that the red circling limitation was not an impediment to Title VII relief, that it was "doubtful that [the limitation] had [a deterring] effect on any who generally wished to transfer". 6 FEPC at 523. This conclusion was apparently based [21] upon the failure of most employee-witnesses to testify that they had been discouraged from transferring because of the red circling limitation.

This Court, in *Stevenson* v. *International Paper Co.*, 5 Cir. 1975, 516 F.2d 103, recently reviewed findings of the same district court with respect to a similar red circling limitation in a memorandum which went into effect at the Mobile paper mill of Scott's competitor. To be sure, we observed there that the evidence was "scant on the existence, in fact, of any [affected class member] who was" inhibited by the $3 an hour limitation on red circling. This suggests that the district court's finding here answers the relevant legal issue. In *Stevenson,* however, we went on to state that

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[21] The trial court also observed that, in the two weeks between the effective date of the Memorandum and the general pay raise "there were 16 postings for jobs in historically white lines of progression . . . [,] the average number [of affected class members] who could have filled each of these jobs was 87 . . . [, and y]et not a single affected clas member took advantage of these 16 opportunities". 6 FEPC at 522. That these facts are legally significant assumes, first, that the affected class members were adequately informed about their rights under the Memorandum and, second, that a two week limitation on the right to exercise special transfer rights is proper. Neither of these assumptions is warranted on this record.

> [I]f the plaintiffs can demonstrate on remand that the limitation presented, *or as presently existing does present,* a practical impediment to any [affected class members,] the district court should take appropriate action. (emphasis added)

Stevenson indicates that, even if the $3 an hour limitation at one time might have been no deterrent to affected class transfer, the relevant inquiry is the present, and not the past. It appears that the base rate of pay at Scott's Mobile mill has, for some time, been substantially higher than $3 an hour. Thus, even if *Stevenson* implicitly holds that evidence of specific deterrents must be adduced, it is inconceivable that affected class members now wishing to transfer would not be deterred by the limitation.

We find, at any rate, that *Stevenson,* in observing that there was scant evidence of an affected class member actually inhibited, did not intend to set a hard and fast rule requiring such evidence before red circling limitations would be enjoined. *Stevenson* recognized that "[i]t is now clear that red circling is a necessary element of a Title VII remedy in most cases", citing *Pettway* v. *American Cast Iron Pipe Co.*, 5 Cir. 1974, 494 F.2d 211, 248. Neither *Pettway,* nor any of the other red circling cases that have come to our attention, suggests that a limitation on red circling is justifiable. Instead, the cases make clear that red circling is to be complete.[22] Any limitation on red circling requires an affected class member to pay a price for an opportunity provided by Title VII. In view of the unanimity of the red circling decisions, *Stevenson* cannot be found to have created a new rule for the Fifth Circuit merely by observing that the plaintiffs must demonstrate that the limitation constituted "a practical impediment".

The district court, in finding significant that "all em-

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[22] *See especially Rogers* v. *International Paper Co.*, 510 F.2d at 1356.

ployees, when seeking to advance in a new line of progression, must be willing to take an initial pay cut in order to eventually earn larger salaries in more desirable jobs'', incorrectly stated Title VII law and ignored the rationale of red circling. That rationale is, simply, that the reduction in wage constitutes a term or condition of employment that discriminates against the affected class members on the basis of race. *Robinson* v. *Lorillard Corp.*, M.D.N.C.1970, 319 F.Supp. 835, 842, *aff'd*, 4 Cir. 1971, 444 F.2d 791.

D. *Blocking*

The Memorandum specifies that contract, or job,

> seniority will continue to be applied in all transfer and promotion situations except where ''affected class'' employees are competing with one or more employees who are not members of the ''affected class'' in which case mill seniority dates will be used *for all competing employees.*

(emphasis added) The plaintiffs contended at trial that Scott's misapplication of this rule has resulted in a ''blocking'' phenomenon.

The district court correctly described Scott's procedures as follows:

> In a case where two or more affected class members compete with non-members, the Memorandum of Understanding requires a three-step procedure. First, affected class members are compared to one another on the basis of contract seniority. Second, the non-members are also compared with one another on the basis of contract seniority. Third, the two surviving employees are compared on the basis of mill seniority, with the more senior man winning the competition.

6 FEPC at 529-30. The district court found this practice justifiable because ''[i]t would be totally unfair now to

permit . . . affected class members who hung back at a time when they could have transferred to now go around the affected class members who had the initiative to transfer at an earlier date'' and, in so doing, ''sacrificed between four and seven years of mill senority and perhaps had to take a cut in pay''. *Id.* at 530-31. The appellants contend that a correct interpretation of the Memorandum, and of Scott's Title VII obligations, requires mill seniority to prevail unless no non-affected class member is competing with an affected class member. We agree with this contention.

The problem can best be understood by reference to the accompanying hypothetical cases.

Seniority Chart

Case I.	Mill	Contract	Case II.	Mill	Contract
AC_1	8	1	AC_1	8	1
AC_2	4	3	AC_2	7	3
NAC	6	2	NAC	6	2

Case III.	Mill	Contract	Case IV.	Mill	Contract
AC_1	8	1	AC_1	8	1
AC_2	4	2	AC_2	7	2
NAC	6	3	NAC	6	3

AC_1, AC_2, and NAC are employees, the first two belonging to the affected class and the last not belonging to the affected class. In each case, all three employees bid for a vacancy in a better job. In Cases II and IV, Scott's three-step procedure enables AC_2 to prevail over NAC. Assuming that AC_1 and AC_2 had an equal opportunity to transfer into their current line of progression,[23] this system does indeed reward the employee who took the initiative.

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[23] Many affected class members had no opportunity to exercise ''initiative'' because they were prevented from transferring to formerly white lines of progression by unlawful education require-

Even with the same assumption, however, this system operates unfairly in Cases I and III. Here, AC_2 does not prevail, but NAC does. This is unfair to AC_1, for had AC_2 not bid on the vacancy, AC_1 would have won the mill seniority competition. Under Scott's interpretation, AC_2 "blocks" AC_1, but does not himself get the vacancy. How this can reward AC_2's initiative is beyond understanding.

The appellants' proposed, alternative system may be easily stated: whenever an affected class member and a nonaffected class member compete for the same job, the employee with the greatest mill seniority is to prevail. When the only competing bidders are affected class members, contract seniority will govern. This system more adequately secures affected class members rightful places.

We note, however, that this system is not without its pecularities. In Cases I and III, AC_1 will win the bidding if NAC bids. However, if NAC does not bid, leaving only AC_1 and AC_2 in the picture, the usual seniority system awards the vacancy to AC_2, the employee with the greatest job seniority. Since NAC will probably not bid (as he will likely know that, if he does, AC_1 will win the competition), AC_2 will move up first. He will be followed by AC_1 and then by NAC. But even under the appellants' system, NAC may bid, either because he does not realize who else will bid or because he hopes that a senior bidder will later decide not to take the job. If he does bid, then AC_1 "jumps" over AC_2.

This fortuity does not require us to discard, however, an otherwise equitable system and replace it with a less equitable system. It may be that no system could be devised that was totally devoid of eccentricity. It is clear,

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ments and the age requirements. Moreover, other affected class members, as we held below, were illegally prohibited from transferring even after the adoption of the Memorandum of Understanding.

however, that Scott's device of playing off affected class members against each other on the basis of contract seniority, and using mill seniority only in the third stop of a three-step procedure, is more than eccentric. It continues the effects of past discrimination without being justified by compelling business necessity.

On remand, the district court should order the appellants' proposed system into effect, modified only by refinements, if any appear, that eliminate the pecularities we have noted without allowing non-affected class members to proceed at the expense of mill senior affected class members.[24]

E. *Educational Requirements for Transfer to Production Jobs*

The Memorandum of Understanding provided that

> Qualification requirements for transfer to any line of progression or for advancement in the line, will be no higher for any employee than for employees working in the line who were hired at approximately the same time.

As we mentioned before with respect to the question whether interviewees were properly informed about the effects of the Memorandum, Scott adopted a system which employed cutoff levels from fourth grade to high school diploma, depending upon the line of progression. The imposition of any educational requirements on the affected class is challenged by the appellants. They contend that, because they were absolutely prohibited from entering white lines of progression when they first were employed by Scott, no educational requirements whatsoever may now

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[24] The system we approve here has been adopted by one district court in two consent decrees. See *Bumpers* v. *National Gypsum Co.*, Civ. #7843-73-P, S.D.Ala. 1974, slip op. at 3, 5; *Suggs* v. *Container Corp. of America*, Civ. #7058-72-P, S.D.Ala. 1974, slip op. at 8.

be imposed on transfer to such lines.[25] In the event, however, that Title VII allows some educational requirements, the appellants argue that the requirements actually employed by Scott have not, and cannot, be shown to be justified by a business necessity.

Scott, on the other hand, argues that Title VII does not require remedial action if an employee was not discriminated against originally. Although Scott admits that segregated lines of progression were maintained until 1963, it argues that affected class members with less formal education than any non-affected class member in a particular line of progression were not discriminated against and would not have received a job in that line in the absence of segregation. As support for this argument, Scott points to testimony of its Manager of Administrative Services that the best applicant was always chosen for a job opening even when Scott did not have a formal high school diploma requirement. The district court found that "Memorandum imposed no requirements on blacks that were higher than requirements imposed on whites who were hired at or about the same time and accordingly [was] not in terms discriminatory" 6 FEPC at 546. Finally, the district court held that the educational requirements were "justified by business necessity and thus . . . legal in any event".[26] *Id.*

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[25] To this extent, appellants contend that the Memorandum, even if properly applied, did not go far enough in the Production Department.

[26] The district court's conclusion that the educational requirements were lawfully imposed upon the affected class was limited by a perplexing distinction drawn between affected class members hired while whites were required to have high school diplomas and affected class members hired before whites were required to have high school diplomas. The court concluded that

> requiring affected class members who were employed between 1958 and 1963 who have not achieved a high school or GED equivalent to bid against white employees who were employed at the same time and had to have a high school achievement is discriminating. Obviously, there are whites who were employed prior to 1959 without a high school achievement who are adequately performing their functions. This segment of the affected class are not to be required to have a higher educational level than those whites employed prior to 1959.

6 FEPC at 546. First, we suggest that if a distinction is to be drawn between these two segments of the affected class, the opposite conclusion should be drawn, because the pre-1958 black hirees were more obviously discriminated against than the later black hirees. Second, and more important, the district court's conclusion here demonstrates that it actually *was* convinced that Scott's educational requirements were not justified by business necessity. We note that this portion of the district court's opinion was not adopted verbatim from the defendants' proposed findings and conclusions. The obvious inconsistency between the court's personal conclusions and its conclusions as recommended by one of the parties demonstrates the hazards of placing too much reliance upon the parties in the formulation of an opinion. *Cf. Louis Dreyfus & Cie.* v. *Panama Canal Co.*, 5 Cir. 1962, 298 F.2d 733, 738-39 (findings of fact).

In *Griggs* v. *Duke Power Co.*, 1971, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158, the Supreme Court held that a high school requirement having a discriminatory impact on hiring was not supportable under Title VII. The Court, rejected the high school requirement because it had been instituted merely upon the employer's judgment that it would generally improve the overall quality of the work force, stated that

> [t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

Id. at 431, 91 S.Ct. at 853, 28 L.Ed.2d at 164. The first step in the relevant inquiry is whether the practice of Scott is "discriminatory in operation".

1. Discriminatory In Operation

We note, first, that the district court observed that "the [education] requirements were not shown to have had an adverse impact on black employees by disqualifying more black than white employees". 6 FEPC at 546. This observation is erroneous. Since no whites are in the affected class, any restriction on the affected class holds back more blacks than whites. In any event, this was not the basis from which to judge whether the employment practice here was discriminatory in operation.

An employment practice is discriminatory in operation with respect to an affected class if it retards the advancement of qualified class members to jobs they might have had in the absence of discrimination. See, e.g., Local 189, 416 F.2d at 983. It is indeed difficult to tell from the record whether Scott's educational requirements are discriminatory in operation. The mere fact, however, that Scott always hired the best qualified white applicant does not answer the relevant question. A black with a fourth grade education might conceivably have secured a job ahead of a white with a sixth grade education had there been no discrimination. On the other hand, if the disparity, between education levels of rejected black applicants and accepted whites, approaches four or five years, it seems much more likely that the black would not have achieved the job appointment notwithstanding discrimination.

If the burden of proof at this juncture rested on the plaintiffs, we would be bound, under the "clearly erroneous" doctrine, to affirm the district court's implicit finding that formal educational levels did indeed play a determining part in Scott's pre-1958 initial employment decisions. Once it has been shown, however, that an employer was discriminating against a class of employees, the employer must shoulder the burden of persuasion to show that a particular employee was unqualified for a position in an all-white line of progression. Cf. *Franks* v. *Bowman*, 1976,

—— U.S. ——, ——, 96 S.Ct. 1251, 1268, 47 L.Ed.2d ——, ——, 44 U.S.L.W. 4356, 4363. In *Jacksonville Terminal Co.*, the district court had found that the government had failed or refused

> to undertake a comparative evaluation of the entitlement to job vacancies of competing Negroes and whites, upon the basis of individual qualifications, [which left] the record without probative evidence to support [the contention that black employees were not even considered for jobs given to whites] . . . [P]roof that whites were hired into jobs despite qualifications less or equal to those of competing Negroes was not produced.

United States v. *Jacksonville Terminal Co.*, M.D.Fla.1970, 316 F.Supp. 567, 581. On appeal, we cautioned that

> [t]he trial judge's pronouncement cannot function as a general rule. *It becomes valid only when the employer . . . evidentially demonstrates that objective criteria pertinent to the particular job are the determinants of who is "best qualified".*

451 F.2d at 442 (emphasis added). We then considered the actual facts of the employer's hiring practices and found that there were many instances in which the "best qualified" individual had in fact been given jobs, and that the absence of blacks from skilled positions was accounted for by the fact that the general decline of the railroad industry had caused "many white workers experienced in skilled jobs" to be available in the railroad labor market. *Id.* at 445. The employer in *Jacksonville Terminal* had adequately carried its burden. This is not so, however, with respect to Scott. All the record contains is the bald statement of one official that the "best qualified" applicant was always hired for an opening. It was just such an assertion, however, which did not, in *Jacksonville Terminal Co.*, justify the

district court's rejection of a claim of discrimination without putting the *employer* to the test.

In *Jacksonville Terminal Co.* employment practices were *alleged* to be overtly discriminatory; here the employment practices were once admittedly discriminatory, and the question is who, in fact, was discriminated against. The relevant question in both cases is "to what extent was there discrimination?" We conclude that Scott has not shown that members of the affected class, with lower formal educational status than the "least educated white", would not have achieved "white" jobs in the absence of discrimination.[27]

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[27] Our conclusion is influenced in part by our examination of other cases which have held that formal education requirements imposed upon an affected class, but not imposed upon the contemporaries of that class, violate Title VII. In these cases, when the employer was ordered to discontinue the formal education requirement there was no limitation to that order keyed to the "least educated white man" in a particular line of progression. *See, e. g., Pettway* v. *American Cast Iron Pipe Co.*, 5 Cir. 1974, 494 F.2d 211, 245; *Johnson* v. *Goodyear Tire & Rubber Co.*, 5 Cir. 1974, 491 F.2d 1364, 1370, *aff'g* S.D.Tex. 1972, 349 F.Supp. 3, 14, 17; *Griggs* v. *Duke Power Co.*, 4 Cir. 1970, 420 F.2d 1225, 1230-31, *rev'd on other grounds*, 1971, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158; *Broussard* v. *Schlumberger Well Servs.*, S.D.Tex. 1970, 315 F.Supp. 506, 512. *See also* EEOC Guideline 1607.11, 29 C.F.R. 1607.11:

> No employee selection standard can be imposed upon a class of individuals protected by Title VII who, but for prior discrimination, would have been granted *the opportuntiy* to qualify under less stringent selection standards previously in force.

(emphasis added) This Guideline does not require that the affected class member show that he would have been *able* to qualify in the absence of discrimination; it requires only that he show that he lost the *opportunity* to qualify. (Of course, this Guideline goes a step farther than does the rule we set forth in *Local 189*, for it does not allow consideration of whether a newly imposed requirement might be a business necessity.)

Scott is to be afforded an opportunity, however, to show that particular members of the affected class would not have received jobs in white lines of progression in the absence of discrimination. This opportunity is required by *Franks* v. *Bowman*, 1976, —— U.S. ——, ——, 96 S.Ct. 1251, 1268, 47 L.Ed.2d ——, ——, 44 U.S.L.W. 4356, 4363. There, in rejecting a district court's denial of constructive seniority from the time of initial employment applications, the Supreme Court stated that

> at such time as individual class members seek positions . . . for which they are presumptively entitled to priority hiring consideration . . . , evidence that particular individuals were not in fact victims of racial discrimination will be material.

We caution, however, as did the Supreme Court, that "the burden will be upon [the employer] to prove that individuals who reapply were not in fact victims of previous hiring discrimination" and that if such proof is to be a showing that the individual was not qualified, the employer must show nonqualification "under nondiscriminatory standards *actually applied* . . . to individuals who were in fact hired . . .". *Id.* —— U.S. at ——, 96 S.Ct. at 1268, 47 L.Ed. 2d at ——, 44 U.S.L.W. at 4363 & n. 32.

2. Lack of Justification by Business Necessity

The district court found that all of Scott's educational requirements were justified by business necessity.[28] With

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[28] The Court of Appeals decision in the *Griggs* case is cited by the appellants as standing for the proposition that the educational requirements cannot be imposed, regardless of business necessity. In that case, the Court of Appeals held that six blacks who were hired before the employer imposed the high school requirement were entitled to relief. Although the employer could continue to require diplomas in his initial hiring decisions, the educational requirement for transfer was to be "waived" as to these six blacks. 420 F.2d at 1231. The Supreme Court reversed the holding that

respect to jobs in the Chemical Recovery line, for example, the court found that employees

> must be able to monitor a complex control panel in order to prevent explosive situations from developing in the boilers. Failure of the workers to do their job properly would put all of the employees in the entire plant in extreme danger.

6 FEPC at 523. The court approved of Scott's high school requirements for the Bleach Plant and P & C Technical Control lines because they required that the workers "employ laboratory techniques"; the trial judge noted, as an example, that the employee in the top job in the Technical Control line "must be able to prepare all the chemicals needed for the laboratory's operations". *Id.* Finally, the district court approved of the high school requirement for the job of Scaler, because

> Scott expends some $21 million annually for wood on the basis of the tickets submitted by the Scalers. [N]o one in the Controller's Office checks, or could check, the accuracy of these tickets.

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the high school requirement was permissible for new employees. *Griggs* v. *Duke Power Co.*, 1971, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158. The Supreme Court noted the Court of Appeals' action, 401 U.S. at 429 & n. 4, 91 S.Ct. at 852, 28 L.Ed.2d at 163, but stated that it had granted certiorari on the claim that the Court of Appeals had erred in holding that the employer's good faith and the requirements' relation to general intelligence satisfied Title VII. *Id.* at 429, 91 S.Ct. at 852, 28 L.Ed.2d at 163. There was no comment concerning the correctness of the "waiver" part of the lower court's holding, for the requirements were found not to be job-related anyway. It is incorrect, therefore, to describe the Superme Court decision as "affirming in pertinent part" the Court of Appeals decision. Instead, with respect to the "waiver" portion of its opinion, the Court of Appeals was "reversed on other grounds" by the Supreme Court.

Id. at 524. With respect to the lines of progression or jobs in which Scott reduced transfer requirements for affected class members, the district court concluded

> It was . . . *obvious* that Scott could not abandon all educational requirements and incur the risk that older employees with little or no schooling would use their substantial mill seniority to move into demanding positions for which they could not reasonably expect to qualify without extremely long training periods, *if then.*

Id. at 523. (emphasis added).

(a). *High School Requirement*

The district court was obviously concerned about the advisability of putting affected class members into lines of progression where they might not be qualified for the top job at the time of transfer. The Supreme Court has provided instruction in this area.

In *Griggs*, the Supreme Court held that a high school diploma requirement for hiring and transfer was not justified by business necessity, where a finding that "white employees hired before the time of the high school education requirement continued to perform satisfactorily and achieve promotions" was not challenged. There was no basis, therefore, for the employer's contention that the requirement served its "avowed policy of advancement", and the Court did not find it necessary to decide whether that contention, if factually supported, would be legally relevant. In *Albemarle Paper Co.* v. *Moody*, 1975, 422 U.S. 405, 434, 95 S.Ct. 2362, 2379, 45 L.Ed.2d 280, 305-06, the Supreme Court again addressed this issue, this time with respect to the validation of a test requirement. The Court "endorsed" EEOC Guideline 1607.4(c)(1), 29 C.F.R. § 1607.4 (c)(1), which provides:

> If job progression structures and seniority provision are so established that new employees will probably,

> within a reasonable period of time and in a great majority of cases, progress to a higher level, it may be considered that candidates are being evaluated for jobs at that higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it shall be considered that candidates are being evaluated for a job at or near the entry level.

The Court warned, therefore, that conclusions drawn about the job-relatedness of a requirement be tempered with considerations of

> the normal speed of promotion, . . . the efficacy of on-the-job training in the scheme of promotion, and . . . the possible use of testing as a promotion device, rather than as a screen for entry into low level jobs.

Id. It does not appear that the decision of the district court satisfies the requirements set forth in *Moody*, in that the decision focuses only on "top jobs", and does not show why on-the-job training is unefficacious. This shortcoming is understandable in light of the fact that the district court's decision predated the Supreme Court's decision by about two years. Nevertheless, present equitable standards must govern this appeal.

Here, the district court found that the high school requirement was adopted by Scott because Scott had found it "helpful in selecting the best people for training" at another paper mill. 6 FEPC at 518. The court found this requirement justified because "[n]ew, more sophisticated equipment was coming into use". *Id.* The court recognized, however, that there were some employees in lines of progression who had failed to earn a high school diploma. It explained that "these employees were able to make up for this by growing with the job as new machinery was adopted". The court went on to say that

> *It was not shown* however, *that* these *non-high school graduates are equal in performance with those who had finished high school.* An employee entering the line for the first time would, of course, not have this advantage of prior training, so that his lack of education would be a far more serious obstacle to his learning the job.

Id. at 519 (emphasis added).

The district court seemed to have been under the impression that it was the plaintiff's responsibility to prove that non-high school graduates are currently equal in performance to high school graduates in formerly white lines of progression. This is backwards. If Scott wishes to validate any barrier to the advancement of affected class members to their rightful places, it has the burden of showing business necessity. Then, even assuming that non-high school graduates do not perform *as well as* high school graduates, the question should be whether non-high school graduates perform *adequately*. For only if the diplomaless individual is not adequate to a job may his exclusion from that job be deemed a business necessity.[29] Next, the fact

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[29] *See, e.g., Dozier* v. *Chupka*, S.D.Ohio 1975, 395 F.Supp. 836, 850 (overturning high school requirement for employment in fire department, noting that non-high school graduates already in the department "continue to perform their duties"); *cf. Stamps* v. *Detroit Edison Co.*, S.D.Mich. 1973, 365 F.Supp. 87, 118 (cut-off scores on employment tests, in order to be valid, must not be higher than those of employees "who have been *sufficiently* able to perform in the past") (emphasis added).

Commentators have been almost unanimous in their condemnation of "best qualified" hiring practices. *See Bernhardt, Griggs* v. *Duke Power Co.: The Implications for Private and Public Employers*, 50 Tex.L.Rev. 901, 916 (1972); Note, *Employment Discrimination: The Burden is on Business*, 31 Md.L.Rev. 255, 267 (1971); Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 Rutgers L.Rev. 465, 498 (1968); 52 N.C.L. Rev. 181, 190 (1973); Note, *Legal Implications of the Use of*

that lack of a diploma may be a "serious obstacle" to an individual learning a job—and we assume for the purposes of this observation that the district court felt that there would be an obstacle to learning an entry level job—does not show that the diploma is a business necessity. For all that the district court's findings show, on-the-job training could, within a relatively short time, make up the disparity between the diploma holder and the non-diploma holder.[30]

The problems in the district court's reasoning are particularly distressing where, as here, the record demonstrates that there may well be no business necessity for the diploma requirement. First, as in *Moody*, there are non-high school graduates in the relevant lines of progression who are performing "adequately". This was "obvious" to the district court in its Conclusions of Law. 6 FEPC at 546. Second, the labor agreement between Scott

Standardized Ability Tests in Employment and Education, 68 Colum.L.Rev. 691, 712 (1968). *But see* Fiss, *A Theory of Fair Employment Laws*, 38 U.Chi.L.Rev. 235, 303 (1968).

[30] We reject, as unsupported by any evidence, the district court's conclusion that a high school diploma "increases tremendously the odds that" a person could be trained to perform in one of the "sensitive" lines of progression. See 6 FEPC at 523. The court's conclusion was based on its assumption that the creation and validation of a test that more precisely screened applicants would be very expensive, and that, because of the occasional nature of job vacancies, "the simplicity of a high school requirement seems all the more justifiable". *Id.* at 523-24 n. 14. We believe, however, that, even if the creation and validation of screening tests is expensive, the expense is a burden the employer must bear if it desires to use tests that operate discriminatorily or perpetuate the effects of past discrimination. Furthermore, the Supreme Court explicitly stated in *Griggs* that "Congress . . . commanded . . . that any tests used must measure the person for the job and not the person in the abstract". 401 U.S. at 436, 91 S.Ct. at 856, 28 L.Ed.2d at 167. The district court's attempt to justify the diploma requirement on the ground of simplicity seems but an end run around the teaching of *Griggs*.

and the various unions demonstrates that a promotee or transferee's ability to perform a job is often considered after promotion or transfer. Thus, a new employee is on probationary status for ninety days before becoming a permanent employee. Furthermore, "[w]hen an employee is permanently promoted to a higher job and feels he is unable to or fails to perform adequately the work of the higher job, he will be able to go back to his former job", and, after six months more training, again be considered for promotion. Labor Agreement Effective June 1, 1968, § 9. Clearly, even under current practice at Scott's plant, there is some give and take for on-the-job self-selection, evaluation, and training. If current procedures were inadequate to protect Scott from the possibility of putting unqualified workers into sensitive positions, it is still possible that enlargements of probationary periods or intensive training programs would have met the requirements of business necessity. It is certain that such modifications would have been less restrictive of the affected class than wholesale exclusion. The Supreme Court declared in *Moody*, 422 U.S. at 425, 95 S.Ct. at 2375, 45 L.Ed.2d at 301, that

> [i]f an employer does . . . meet the burden of proving that its tests are "job related," it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in "efficient and trustworthy workmanship."

It is clear that business necessity is limited to those cases where an employer has no other choice. Here, even if the diploma requirement is job-related, it is likely that its abrogation will not result in unqualified employees being thrown into impossible situations, an outcome clearly not intended by Title VII. Because we hold, however, that Scott has failed in its effort to prove job-relatedness, we do not actually reach the issue of whether less restrictive employment alternatives were available.

We held in *Pettway*, 494 F.2d at 237-38, that a high school diploma requirement was invalid when the employer was attempting to find employees who had "a certain reading level and familiarity with study techniques necessary to participate in the course work of the apprentice program". Similarly, we struck down a diploma requirement in *United States* v. *Georgia Power Co.*, 5 Cir. 1973, 474 F.2d 906, 918, where the justification offered at trial was similar to that offered here: that there was an "eventual need for above-average ability to read and comprehend the increasingly technical maintenance manuals, the training bulletins, operating instructions, forms and the like demanded by the sophisticated industry . . .".

As the *Griggs* Court observed, 401 U.S. at 433, 91 S.Ct. at 854, 28 L.Ed.2d at 165,

> History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, displomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.

The use of a diploma requirement seems predicated on the assumption that high school graduates will be able to read, to learn, and to achieve in industry because they were able to achieve in school. This assumption does not meet the demanding standards of Title VII. Dropping out of school may have resulted from the dropout's being obliged to work to support his family, and not necessarily from inability to achieve the skills demanded by an employer. Finally, even if graduation conclusively shows some achievement, there is no necessary correlation between that achievement and job performance. Graduation from high school demonstrates an ability to pass the various tests administered by the particular school. Certainly,

where so many kinds of employment tests have been shown to be unrelated to job performance, it is likely that high school tests, not even designed to predict performance, are subject to the same flaws.[31]

In short, we hold that the record in this case provided no basis by which the district court could have deemed the high school requirement for transfer to four jobs or lines of progression required by business necessity. Its finding to that effect is, therefore, clearly erroneous.[32]

(b). *Other Educational Requirements for Transfer*

No case law has been cited or discovered that deals with the question whether grade school achievement less than a high school diploma may be a transfer prerequisite justifiably imposed on an affected class. Our discussion of the diploma requirement itself is, however, broad enough to,

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[31] *See Johnson* v. *Goodyear Tire & Rubber Co.*, 5 Cir. 1974, 491 F.2d 1364, 1371-72. There, in affirming a district court's injunction preventing further use of a diploma requirement, we noted that the employer had never attempted to validate that criterion. We cited the EEOC Guidelines for validation, 29 C.F.R. §§ 1607.1-14, and noted that the failure to validate *compelled* the conclusion that the requirement was invalid.

[32] We note that two cases, from other circuits, have upheld the use of formal education requirements despite the possibility of adverse racial effects. *See Spurlock* v. *United Airlines, Inc.*, 10 Cir. 1972, 475 F.2d 216, *criticized in* 52 N.C.L.Rev. 181 (1973) (college degree for entrance into flight officer training program); *Castro* v. *Beecher*, 1 Cir. 1972, 459 F.2d 725, 735 (high school diploma for entrance to police department). These cases are factually distinguishable from the instant case, however. In *Spurlock*, the college requirement could be waived if the applicant had had sufficient experience on high-speed jets, and the rigorous training program involved classroom experiences very similar to those provided by college; in *Castro*, a "meaningful study", in the language of *Griggs*, had been accomplished by, among others, a President's Commision on Law Enforcement and the Administration of Justice. To the extent that these cases vary from our analysis of Scott's diploma requirement, we find them unpersuasive.

and does, control here. The biggest problem with requiring grade school achievement is that such a requirement rests on an assumption not entitled to protection from Title VII scrutiny: that the failure to achieve in school reflects an inability to achieve on the job. Grade school achievement requirements have never been validated by Scott or, to our knowledge, by any other manufacturer. As we said before, Scott's promotion system is already flexible enough to accommodate trainees, and transferring affected class members will not be advanced to the most difficult positions without an opportunity to acquire necessary skills. In these circumstances, the grade school achievement requirements cannot stand.

IV. Production Department—Structural Changes That Might Remedy Adverse Effects of Prior Discrimination

The Memorandum stated that the question of "revisions" in lines of progression would be referred to negotiations between Scott and the unions. An agreement with respect to the merger of progression lines was to be reached within 90 days of the ratification of the Memorandum, and further meetings were to determine which lines could be shortened, and which jobs, if any, could be skipped in advancing within or transferring between lines. Despite this agreement, no substantial changes were made in job structure at Scott's mill. Although Scott cites four cases in which it revised job structures so as "to afford black employees better advancement opportunities", these revisions, in large part, resulted only in white jobs being "stacked" on top of black jobs. Thus, although it is true that a majority of affected class members are now in formerly all-white lines, the requirement that jobs be held in sequential order in any line of progression has the tendency to "lock in" formerly discriminated-against blacks.

We have held that, consistent with an employer's

> legitimate interest in maintaining the skill and efficiency of its labor force, . . . any structural impediments which delay the attainment by Negroes of jobs generally as good as those held by their white contemporaries or which force Negroes to pay a price for those opportunities are required by law to be removed.

Long v. *Georgia Kraft Co.*, 5 Cir. 1971, 450 F.2d 557, 560, *quoting United States* v. *Local 189, United Papermakers and Paperworkers*, E.D.La.1969, 301 F.Supp. 906, 917, *aff'd*, 5 Cir. 1969, 416 F.2d 980, *cert. denied*, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100. The removal of structural impediments has called, in other cases, for advanced level entry and job skipping. See, e. g., *Pettway*, 494 F.2d at 248-49 & n. 106; *United States* v. *Hayes International Corp.*, 5 Cir. 1972, 456 F.2d 112, 116-19; *Long*, 450 F.2d at 562.

In this case, however, the district court ordered no mergers, no advanced level entry, and no job skipping. Its detailed findings of fact explain why, according to the court, mergers were unnecessary in a number of cases, or were infeasible in other cases. Although we cannot say that these findings are clearly erroneous, the issue does not end there. There were no detailed findings, or findings of any kind, for that matter, concerning the possibility of advanced level entry and job skipping. It was Scott's responsibility to show that any impediments to affected class members' rightful places were justified by business necessity. *Stevenson* v. *International Paper Co.*, 5 Cir. 1975, 516 F.2d 103, 114-15. This was not done.[33] As in *Stevenson*, we re-

[33] Scott contends that the plaintiffs are seeking, on appeal, a type of relief that it had not sought before the district court originally. A review of the pre-trial proceedings shows this contention to be unfounded. The complaint, filed in 1971, alleged simply that Scott's hiring and promotion practices were discrimi-

mand for further consideration in the light of *Pettway* the issues of job skipping and advanced level entry.[34]

V. Maintenance Department

The employees contend that any test or educational requirements imposed upon affected class members for transfer to the Maintenance Department is per se illegal. With respect to the rest of the plaintiff class, the appellants allege that the requirements for entrance into Maintenance discriminate against black candidates. Finally, appellants contend that none of Scott's Maintenance Department requirements is valid under the appropriate EEOC Guidelines.

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natory. In its amended complaint, filed in 1972, the plaintiffs charged that the defendants' "system for promotion, transfer, and seniority, . . . has the design . . . [of] continu[ing] and preserv[ing] the defendants' " practice of racial discrimination. The amended complaint sought injunctive relief from such employment practices which limited or otherwise interfered with the plaintiffs' rights to equal employment opportunities. Finally, the Pretrial Order of 1973 indicated that the following was a disputed fact: "To what extent has the Memorandum of Understanding (a) eliminated continuing discrimination and (b) remedied the present effects of past discrimination?" This was sufficient to raise the issue of advanced level entry and job skipping at the time of trial, and the record does not demonstrate that the plaintiffs decided in the midst of the litigation to give up their rights to general equitable relief. The district court's conclusion of law, to the effect that "there is no need for Scott to restructure lines of progression any further, *or to* institute special *provisions for job skipping or advanced level entry*", (emphasis added) establishes that the issue was, in fact, ruled on below.

[34] The district court's opinion reveals a misconception about the type of relief being sought by the plaintiffs. The plaintiffs were seeking structural modification, not for every black employee, but only for the members of the affected class. Although Scott could, if it wanted to, bargain to make those modifications apply to all employees, it need not extend those opportunities to all employees.

Scott, on the other hand, argues that, even with respect to the affected class, such requirements may be imposed. This is because they are allegedly related to job performance and because affected class members are not " 'locked in' to low-paying jobs without advancement or transfer opportunities". Scott also argues that there has been no showing of a disparate racial impact with respect to the high school requirement or the Scott Battery test. Finally, Scott contends that all of its Maintenance Department requirements are justified by business necessity and have been professionally validated by an expert in industrial psychology.

The district court agreed with Scott's contentions. Specifically, the court found that "[t]he requirement that applicants for [Maintenance] vacancies have a high school education [was] not shown to have an adverse impact on blacks by eliminating disproportionately more blacks than whites . . .". 6 FEPC at 547. Moreover, Scott was held to have shown that the high school requirement was a business necessity because it "greatly increases the likelihood that the applicant's intelligence, learning ability, and persistence will be adequate to assure successful completion of the approximately four years of training required to be a Journeyman". *Id.* With respect to the Scott Battery, the court found that the plaintiffs' statistics "were too insubstantial to show that the tests have an adverse impact . . .". *Id.* Finally, the court held that the validation study conducted by Scott's expert, Dr. Scott, was adequate to show job-relatedness "even if it did not happen to conform in all details to particular governmental guidelines, for such guidelines are intended as just that, guidelines rather than rigid rules". *Id.* at 548.

A. *High School Requirement*

We have already held that the high school diploma requirement is not justified by business necessity with respect to transfers between production lines of progression. We

recognize that there are differences between the systems of progression in the Production Department and in the Maintenance Department. In Production, progression depends very much on what vacancies are open, the employee's motivation to bid for them, and comparative seniority. In Maintenance, progress during the early years as a helper is more or less automatic, but advancement to Journeyman status depends more upon qualifications.[35] The differences between the two departments are not so significant, however, as to require a different result. The high school requirement is not a business necessity and cannot, therefore, be imposed upon members of the affected class who would have been able to transfer, except for race, prior to the date in 1958 that the diploma requirement was placed on whites.

For those blacks who, after that date, were ineligible for transfer because they lacked a high school diploma, the trial court's observation that the requirement did not have a disproportionate impact on blacks is more relevant. The record is meager on this subject, and although it is the plaintiff's burden to prove disproportionate impact, it stretches the imagination to believe that blacks have not been more seriously affected than whites. Statistical data not introduced at trial but nevertheless available to the district court show that blacks generally were graduated from high school at a lower rate than whites. See, e. g., *Johnson*, 491 F.2d at 1371; *Georgia Power Co.*, 474 F.2d at 918.[36] Indeed, the provision of the Memorandum of Understanding that abrogates the diploma requirement for transfer *within* the Production Department is meaningless unless blacks were handicapped by such a requirement.

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[35] *See* 6 FEPC at 532.

[36] *See also* 1970 Census Reports, Detailed Characteristics Alabama (PC(1)-D2), Table 148, at 2-498, which indicates that approximately 33% of white males in the 30-40 age range, compared to only 22% of black males, have completed high school.

The lack of concentration on this area during the trial can only be explained by surmising that the disproportionate impact of the high school requirement was recognized by all. In short, the district court's finding is unsupportable and, therefore, clearly erroneous.

Because of the disproportionate impact, it was Scott's responsibility to prove at least that the high school requirement was job-related. Our earlier discussion with respect to the diploma requirement within the Production Department is pertinent here, as well as our discussion below showing the inadequacies of Scott's attempt to validate the Scott Battery. Scott has made no attempt to validate the high school requirement, and the requirement fails for that reason.

B. *Scott Battery*

1. Disparate Racial Impact.

In 1958 Scott began using the Kopas Aptitude Test to screen transfers to helper jobs (beginning jobs in the Maintenance Department). Rigid cutoff scores were not employed, however. When, in 1963, blacks were formally admitted to the Maintenance Department, the Kopas Test was still employed; at this time, however, rigid cutoff scores were used. On July 1, 1968, the Wonderlic Aptitude Test was substituted for the Kopas Test. Finally, in November 1970 the Scott Battery of three aptitude tests was substituted for the Wonderlic Test.

It is virtually undenied that the Kopas and Wonderlic Tests had a discriminatory impact upon blacks. Although the Wonderlic Test was recommended to Scott by the OFCC, this test has been shown to be discriminatory in impact in a number of other Title VII cases. See, e. g., *Griggs, supra*. As the EEOC, amicus curiae, summarizes the situation

> as of December of 1972, there were only six blacks among the ranks of the more than 450 hourly mainte-

> nance craft employees. Only three of the blacks had managed to transfer to maintenance jobs between the time the Company ostensibly opened formerly all-white jobs to blacks in March of 1963 and the effective date of the Memorandum.

We have recognized that a statistical showing of black exclusion from a particular kind of job establishes a prima facie case of discrimination. See *Rowe* v. *General Motors Corp.*, 5 Cir. 1972, 457 F.2d 348; *Bing* v. *Roadway Express*, 5 Cir. 1971, 444 F.2d 687, 689.[37]

The data with respect to the Scott Battery, however, are less complete. At the time of the trial, only seven blacks had attempted to pass the exam; two passed, although one of those had to take the Battery three times in order to do so. Sixty-one white applicants took the Battery and 24 passed all three tests. The passing rate was therefore 39.3 percent. For blacks, the rate was 28.6 [38] percent. The court found that this difference was too insignificant to show a discriminatory impact in the absence of evidence of actual cultural bias in the tests. Moreover, as the trial court found, the sample was too small to render the comparative percentages meaningful. Equity requires that we remand for further evidence. The Scott Battery has, presumably, been used in the years since trial. There will be, therefore, a more adequate basis for determining whether the Scott

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[37] Since the Kopas and Wonderlic Tests were not validated by Scott, their use violated the Title VII rights of blacks who failed to gain promotion because of their failure on such tests. *See* 6 FEPC at 549 (Conclusion of Law 14(d)). The district court is directed to provide appropriate relief.

[38] These computations are based on a comparison of the number of people who took the exam and the number who passed. If, instead, the computation is based on a comparison of the number of times the exam was taken and the number of times it was passed, the corresponding figures would be 36.3% and 22.2%. (Four whites took the exam twice before passing. One white took the exam twice and failed twice. See Pl.Exh. 8.).

Battery has a discriminatory impact. If the court on remand decides that there is no discriminatory impact, Scott need not perform the additional validation studies that the next section of this opinion would otherwise require.

2. Job-relatedness of Scott Battery

Any analysis of the validity of an employment standard that operates to disqualify significantly more of one race than of another must begin with reference to *Griggs*. There, the Supreme Court held that a high school requirement and a general intelligence test requirement were prohibited by Title VII in view of the fact that there was no evidence that showed these criteria were related to the ability to perform in a specific job. As the Court said, 401 U.S. at 431, 91 S.Ct. at 853, 28 L.Ed.2d at 164,

> The Act proscribes not only overt discrimination but practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

Although the principle was easy to state, its application to actual employment situations was fraught with difficulty. The *Griggs* decision cast little light on the methods by which an employment criterion was to be judged with respect to job-relatedness. Until the decision last Term in *Moody* v. *Albemarle Paper Co., supra*, the lower federal courts were left to their own sources of illumination.

In *Moody*, the Supreme Court affirmed a Fourth Circuit decision holding that, despite a district court's approval of a validation attempt of two written employment tests, the tests had not been properly validated. The most significant aspect of *Moody* is that it relied heavily on the EEOC Guidelines on Employment Selection Procedures, 29 C.F.R. Part 1607, in holding that the validation attempt was in-

adequate. The Court realized that the Guidelines are not "administrative 'regulations' promulgated pursuant to formal procedures established by the Congress". 422 U.S. at 431, 95 S.Ct. at 2378, 45 L.Ed. 2d at 304. Nevertheless, the Court reaffirmed its observation in *Griggs* that the Guidelines are "entitled to great deference", and found that "[m]*easured against the Guidelines, Albemarles' validation study is materially defective in several respects*". *Id.* (emphasis added). Although the authority of the Guidelines as we understood it in *Georgia Power* may be less compelling than *Moody* now suggests,[39] even in *Georgia Power* we held that the Guidelines "should be followed absent a showing that some cogent reason exists for noncompliance". 474 F.2d at 913. The task before us now is the measurement against the Guidelines, of Scott Battery validation study and the determination, when disparities appear, whether there were "cogent" reasons for noncompliance.[40]

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[39] See the discussion of *Georgia Power* in Wilson, *A Second Look at Griggs* v. *Duke Power Company: Ruminations on Job Testing, Discrimination, and the Role of the Federal Courts*, 58 Va.L.Rev. 844, 865-67 (1972), and note 45 *infra*.

[40] Although unnecessary to our decision, we feel it prudent, in view of the possibility that the question will ultimately have to be resolved in this litigation, to comment about the level of significance that complies with the EEOC Guidelines. The Guidelines provide that

> the relationship between the test and at least one relevant criterion [of job performance] must be statistically significant. This ordinarily means that the relationship should be sufficiently high as to have a probability of no more than 1 to 20 to have occurred by chance. . . .

29 CFR § 1607.5(c)(1). This one in twenty requirement is occasionally expressed as significance at the .05 level. Dr. Scott's summary of his test validation inquiry revealed that only one of the tests in the Scott Battery, the Perceptual Speed Test, was significantly valid at this level. The validity of the Purdue Non-Language Test and the Bennett Mechanical Comprehension Test were said by Dr. Scott to "approach" significance at this level.

(a). *Were Dr. Scott's Job Analyses Adequate?*

The Guidelines provide that

> [t]he work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques, the appraisal form(s) and instructions to the rater(s) must be included as part of the validation evidence. . . .

29 C.F.R. § 1607.5(b)(3). The plaintiffs criticize Dr. Scott's study for its failure to utilize written job analyses. Scott Paper Company does not deny that Dr. Scott tested only three maintenance crafts at the Mobile mill, whereas the tests are being used to screen applicants to all maintenance crafts. Nor is it denied that only if the particular job

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At the trial, Dr. Scott testified that "approaching" significance meant correlations in the range of .06 to .10, i. e. that correlations between test results and rating results could have occurred by chance in 6 to 10 out of 100 studies. The trial court found, upon Dr. Scott's testimony, that tests "approaching significance" would be professionally acceptable. The appellants challenged this finding as being in conflict with the Guidelines.

In *Georgia Power*, 474 F.2d 915, we discussed this Guideline in the context of a study which showed that for six jobs "it was approximately as likely that the [test] results were arrived at purely by chance as that they were more scientifically validated". That is, the significance level for some jobs in *Georgia Power* was about .5. Assuming Dr. Scott's testimony is to the effect that the studied tests "approached" significance at the .1 level, the tests challenged here are at least five times more likely to be valid than the tests that were rejected in *Georgia Power*. Furthermore, we observed in *Georgia Power* that

> [w]ere the only criticism of the validation procedures the fact that there was a significance factor of 1 out of 15 or even 1 out of 10 instead of 1 out of 20, the employer might have better standing to complain that the Guideline is arbitrary.

Our observation that a .1 significance level *might* be acceptable is still valid.

skills used in, say, the tested finishing maintenance mechanics craft are not significantly different from the skills required of the untested other crafts, see 29 C.F.R. § 1607.4 (c)(2), can validation of the former suffice as a validation of the latter. The appellants argue that the failure to produce written job analyses deprives the trial court of an adequate basis for accepting Dr. Scott's conclusion that the jobs were "significantly" related.

The district court offered three reasons why Dr. Scott was being given "especially high marks with regard to this threshold step of analyzing the jobs . . .". 6 FEPC at 536. First, the district court placed reliance upon the fact that Dr. Scott was very familiar with paper mill operations and that he had spent about a week in Scott's Chester, Pennsylvania mill closely observing the work of the employees. Second, the district court found that the plaintiffs had failed to show that the technique suggested by its expert, Dr. Ash, was superior to Dr. Scott's technique. Dr. Ash essentially suggested a technique involving long questionnaires to supervisors and a computer job analysis of the answers. The court found that at least Dr. Scott's technique gave him an opportunity to "apply his own judgment or the results of his own observations". 6 FEPC at 536. Third, the fact that Dr. Scott ended up discarding two of the tests that he tried to validate showed that "he was not at all afraid to abandon a test he had initially selected if the evidence did not justify using it". *Id.*

Our primary guidance on this issue is the *Moody* opinion. There, the validation study "involved no analysis of the attributes of, or the particular skills needed in, the studied job groups". 422 U.S. at 432, 95 S.Ct. at 2378, 45 L.Ed.2d at 305. There was no basis, therefore, for concluding that the requirements of 29 C.F.R. § 1607.4(c)(2) had been met. Here, at least, there is something more than "no analysis". Dr. Scott testified that he had spent some time in Scott's paper mill and that he "did analyze the jobs in the sense that I would see people responding in the various jobs".

Although there is no testimony about what particular skills were found significant in particular jobs, the district court could reasonably have concluded that particular skills were considered.

A fair reading of *Moody*, however, suggests that analysis, by itself, does not automatically satisfy Title VII requirements. In *Moody*, the tests were given to ten different job groups and separately studied for validity in each group. The study showed that a test that was valid for one job grouping would not necessarily be valid for another, closely related, grouping. For example, the Wonderlic (Form B) Test was found significant for a group consisting of third, fourth, and fifth hands on the paper machine, although not valid for the higher positions on the paper machine. See 422 U.S. at 437, 95 S.Ct. at 2381, 45 L.Ed.2d at 308 (chart A). Similarly, the Beta Exam was valid for a group of employees high in the wood-yard line of progression, but was not valid for a group of employees immediately below it in the same line of progression. See *id.* As the Court said, the study's "checkered results" compelled the conclusion that there were significant differences between the various jobs.

Here, although there was more analysis than in *Moody*, it is impossible to undertake the same critical appraisal of Dr. Scott's study as the Supreme Court took of the study involved in *Moody*. The data upon which Dr. Scott's validation study was conducted are not available, having been either lost or destroyed.[41] In light of the somewhat surprising results of the study conducted in *Moody*, it

[41] This observation is not meant as criticism of Scott Paper Company or Dr. Scott. The Guidelines provide that there must be "proper safeguards to protect the security of test scores and to insure that scores do not enter into any judgments of employee adequacy that are to be used as criterion measures". 29 CFR § 1607.5(b)(2). It is conceivable that some data were destroyed in an effort to guarantee compliance with this requirement. *See also* 6 FEPC at 533-34.

seems unwise to indulge a presumption, admittedly founded upon expert testimony, that all maintenance crafts require the same job skills and that a test significant or valid for one craft is valid for another. The requirement of the Guidelines that there be "careful job analyses", 29 C.F.R. § 1607.5(b)(3), and that the "[e]vidence of a test's validity should consist of empirical data". 29 C.F.R. § 1607.4(c), are intended to avoid problems such as occurred in the *Moody* study and, for all we know from the record here, plagued Dr. Scott's study as well.

(b). *Were Dr. Scott's Instructions to Supervisor Raters Adequate?*

The second serious problem in Dr. Scott's study is the method by which the supervisors graded or ranked the employees who participated in the validation program. This supervisor rating method was explained by Dr. Scott as follows:

> A Perry Comparison Technique is a rating technique in which . . . let's say 30 members in the validation sample are each paired with every other member and the rater is presented with a paired comparison deck. And on each of those cards in that deck, there are two men or two women, or two individuals as the case may be, and *his job is to look at those two and to check the one whose job performance seems to be the better of the two.* And then, he goes to the second pair, and so on, until . . . he encounters pairs in which every individual in the sample has been compared with every other individual in that sample.
>
> And then, these frequencies of choices are tallied . . . such that . . . *the person who the rater checks rather consistently as being the better performer when compared with all the other individuals, gets the highest rating score,* and one who rather consistently does not get checked when he is paired with other individuals, gets the lowest rating.

(emphasis added). Although there was a mimeographed instruction form for each rater, that form was not introduced into evidence; moreover, it does not appear that the forms required the supervisors to judge specific skills or work functions. Nowhere in the record is there any suggestion that the supervisors were asked to determine something other than which of two employees was "better".

Just such a supervisor rating technique was rejected in *Moody*. The Court observed

> [t]he study compared test scores with subjective supervisorial rankings. While they allow the use of supervisorial rankings in test validation, the Guidelines quite plainly contemplate that the rankings will be elicited with far more care than was demonstrated here. Albemarle's supervisors were asked to rank employees by a "standard" that was extremely vague and fatally open to divergent interpretations . . . [*T*]*he supervisors asked, in each grouping, to "determine which . . .* [*employees*] they felt irrespective of the job that they were actually doing, but in their respective jobs, *did a better job than the person they were rating against. . . .*" (emphasis added) There is no way of knowing precisely what criteria of job performance the supervisors were considering, whether each of the supervisors was considering the same criteria—or whether, indeed, any of the supervisors actually applied a focused and stable body of criteria of any kind. There is, in short, simply no way to determine whether the criteria *actually* considered were sufficiently related to the Company's legitimate interest in job-specific ability to justify a testing system with a racially discriminatory impact.

422 U.S. 432-33, 95 S.Ct. at 2379, 45 L.Ed.2d at 305.

As in *Moody*, there is no way of knowing here whether "any of the supervisors actually applied a focused and stable body of criteria of any kind".

The *Moody* Court quoted the EEOC Guidelines with respect to supervisor rating systems:

> In view of the possibility of bias inherent in subjective evaluations, supervisory rating techniques should be carefully devloped . . . [t]he general point is that all criteria need to be examined to insure freedom from factors which would unfairly depress the scores of minority groups.

Id. at 432-33 n. 30, 95 S.Ct. at 2379, 45 L.Ed.2d at 305, *quoting* 29 C.F.R. § 1607.5(b)(4). The Court of Appeals in *Moody* observed that "[s]upervisory ratings . . . which are possibly the single most common performance measure used in validity studies, are subject to personal prejudice. When test scores are correlated with such ratings, the validation, if it can be called that, is of questionable value and may simply prove that the test has the same bias as the supervisors". 474 F.2d at 139, *quoting* Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: General Approach to Objective Criteria of Hiring and Promotion,* 82 Harv.L.Rev. 1598, 1662 (1969). We agree with these statements and hold that the absence of evidence of the criteria actually employed by the rating supervisors is a fatal flaw in Dr. Scott's validation study.

(c). *Concluding Observations*

We realize, first, that neither the Court of Appeals nor the Supreme Court had rendered its decision in *Moody* at the time of Dr. Scott's validation study. Moreover, it is not clear whether the Guidelines upon which we rely were available at the time of this study. Scott contends that this circumstance is a "cogent" reason for failure to comply with the Guidelines. We have some sympathy for Scott's position, but hold that it reflects a misunderstanding of an employer's responsibilities under Title VII. The employer's task under Title VII is to show the job-relatedness of

discriminatory testing barriers. *Cf. Pettway,* 494 F.2d at 221 n. 21.

Second, in view of our conclusion that the validation study was inadequate, on the grounds enumerated above, we do not rule on the other objections raised by the appellants—that a differential validation study was feasible, that Dr. Scott's study was inadequately reported, and that Dr. Scott's computational methods were professionally unacceptable. If the Scott Battery is found to have a discriminatory impact and Scott still desires to use it, another validation attempt must be made. In considering whether that study, should it take place, is in compliance with Title VII, we suggest that the district court and Scott comply, as far as possible, with the requirements of the EEOC Guidelines.

Finally, we do not expect our holding here to put a heavy practical burden on Scott. Even at the time of trial, Scott was continuing its validation studies. The evidence from which a new study of validity could be conducted may already have been generated. And as the *Moody* Court noted, "the Guidelines authorize provisional use of tests, pending new validation efforts, in certain very limited circumstances. 29 C.F.R. § 1607.9". 422 U.S. at 436, 95 S.Ct. 2380, 45 L.Ed.2d at 307. If the district court determines on remand that the Scott Battery has a disproportionate racial impact, it is within the court's power to consider whether Scott may, consistently with the Guidelines, continue to employ the Scott Battery while conducting a new validation study.

VI. Supervisory Employees

The appellants contend that the district court erred in finding that Scott did not discriminate in the selection of hourly employees for promotion to supervisory [42] jobs. The

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[42] Scott employs supervisors in both the Production and Maintenance Departments. The appellants' argument does not distinguish between the two situations. It is undisputed, however, that

evidence established that blacks received only seven of the 81 promotions to salaried supervisory positions since July 2, 1965. As of trial, there were 186 white supervisors who had been promoted from the hourly ranks, as opposed to 13 blacks. Translated into percentages, about 8.6 percent of all promotions in the eight years before trial went to blacks, and about 6.5 percent of all promoted supervisors at the time of trial were black. This may be compared with the percentage of black production employees (semi-skilled operatives and unskilled laborers): in 1972, there were 1535 whites and 658 blacks, for a black representation of about 30 percent. This percentage has been growing steadily since 1966, when it was 18.3 percent. It appears, therefore, that blacks received less than half the number of promotions to salaried positions they should have received had they been promoted at the same rate as white hourly employees.[43]

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most of Scott's Maintenance supervisors are hired from without the company, and that most are required to have college degrees in engineering. Pre-trial Stipulation 39. The appellants have not argued that this degree requirement is discriminatory in any manner. Also, the incredibly small number of blacks in the Maintenance Department renders infeasible a statistical approach to the question whether there is a prima facie case of discrimination. Insofar as the district court may have found that supervisor selection in the Maintenance Department is nondiscriminatory, the court was not clearly erroneous. Our attention, therefore, is focused only on supervisor selection procedures in the Production Department.

[43] The only numerical figures referred to by the district court are those showing that, at the time of trial, there were 9 black, first line supervisors. *See* 6 FEPC at 541, citing Plaintiff's Exhibit 13. There seems to be some contradiction between Plaintiff's Exhibit 13 and Plaintiff's Exhibit 22, which we rely on in our analysis. Exhibit 22 was referred to by the appellants in their main brief at p. 82, however, and Scott did argue with the figures they cited. See Scott Br. at 45-46. Since our interpretation of Exhibit 22 is more favorable to Scott than the appellants', we believe, as we did in *Rowe*, 457 F.2d at 357 n. 16, that "possible errors are of little consequence".

We note first that the district court found that the "low turnover rate among the supervisory positions" was the "most realistic reason" why "there are not as many black supervisors as Scott would like to have". 6 FEPC at 546. This may be true, but its bearing on the case is minimal. As the statistics show, there has been no shortage of vacancies in supervisory slots. The appellants complain, not about the absolute number of blacks in supervisory positions, but about the fact that whites seem to be preferred to blacks when promotions are made.

Most of the observations of the district court are pertinent, however. The court found that "[s]election of first line supervisors is done by the top management officials at Scott on the basis of the most objective criteria possible". Along with such factors as "attendance records, productivity records, and the number of reprimands received", the court found other criteria, "such as leadership and intelligence", to be "objective criteria as these qualities are easily recognizable in employees whose work has been observed for a number of years". Similarly, the court held that an employee's performance in "temporary set-ups" is an "objective means of determining whether the employee is qualified to be a permanent first line supervisor". *Id.* at 541-42.

In addition, the district court found no evidence that the predominantly white first line supervisors had the authority to decide whom to promote. Another explanation for the disproportionately low number of blacks in supervisory ranks was that a "majority of first level production supervisor vacancies are filled from the upper ranks of incumbent hourly paid employees", and that "there were comparatively few blacks who had risen sufficiently high in enough lines of progression to gain the experience and technical knowledge required of a supervisor". Finally, the court noted that an employee interested in becoming a supervisor had to exercise a "certain degree of initiative" in making his interest known, but that "such initiative is in

itself one test of whether the employee has the potential to be a supervisor". *Id.* In its conclusions of law, the court held that Scott's conduct conformed to the standards we established in *Rowe* v. *General Motors Corp.*, 5 Cir. 1972, 457 F.2d 348. 6 FEPC at 549. The trial court's reference to *Rowe* correctly draws our attention to the Fifth Circuit case most on point.

A. *Prima Facie Case of Discrimination*

In *Rowe*, we encountered statistics very similar to those in this case. We observed that

> [o]ut of a total of 114 employees promoted from hourly jobs to salaried jobs between 1963 and 1967, only 7 were Blacks. Between 1967 and 1969, although 330 employees were promoted/transferred from hourly to salaried jobs, only 20 Blacks were promoted/transferred. Early in 1969, 35 hourly workers were promoted, 8 of this number were Blacks.

Id. at 357. The percentage of blacks in the general working population of the employer varied from 9.8 percent (December, 1966) to 14.1 percent (January, 1969), see *id.* n. 18; the percentage of blacks promoted to salaried jobs was 6.6 percent between 1963 and 1967, and 6.1 percent between 1967 and 1969.

On this basis, we reversed the trial court's determination that blacks had not been subject to discrimination. We said that

> figures of this kind, while not necessarily satisfying the whole case, have critical, if not decisive, significance—certainly, at least in putting on the employer the operational burden of demonstrating why, on acceptable reasons, the apparent disparity is not the real one.

Id. at 358. See also *Hayes International Corp.*, 456 F.2d at 120 (comparing percentages of blacks hired into clerical and technical positions with percentage of blacks in community). In *Hayes*, we observed that

> lopsided ratios are not conclusive proof of past or present discriminatory hiring practices; however, they do present a *prima facie* case. The onus of going forward with the evidence and the burden of persuasion is thus on Hayes.

Id.

The only reasonable interpretation of the statistics from Scott's Mobile plant is that whites have been preferred over blacks in promotions to salaried positions. As in *Rowe* and *Hayes*, at this point it is the employer who bears the burden of persuasion that there are nondiscriminatory reasons for the observed disparity.[44]

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[44] *See also Pettway* v. *American Cast Iron Pipe Co.*, 5 Cir. 1974, 494 F.2d 211, 225 & n. 34; *Johnson* v. *Goodyear Tire & Rubber Co.*, 5 Cir. 1974, 491 F.2d 1364, 1371-73; *United States* v. *Jacksonville Terminal Co.*, 5 Cir. 1971, 451 F.2d 418, 424-36, 441-42; *Brown* v. *Gaston County Dyeing Mach. Co.*, 4 Cir. 1972, 457 F.2d 1377, 1382, *cert. denied*, 409 U.S. 982, 93 S.Ct. 319, 34 L.Ed.2d 246; *Carter* v. *Gallagher*, 8 Cir. 1971, 452 F.2d 315, *cert. denied*, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338; *United States* v. *Ironworkers Local 86*, 9 Cir. 1971, 433 F.2d 544, 550, *cert. denied*, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367; *Jones* v. *Lee Way Motor Freight, Inc.*, 10 Cir. 1970, 431 F.2d 245, 247. As we said in *Pettway*, see 494 F.2d at 225 n. 34,

> The courts have based a finding of adverse impact on data showing the percentages of blacks and whites hired as compared to the percentages of each in the available population. The statistical disparity is held to create a *prima facie* showing of discriminatory impact and thus invokes a requirement that the job relatedness of the overall selection process be established.

We note that the district court's opinion does not suggest that the burden of persuasion had been shifted to the employer. In-

B. *The Employee's Justifications*

The two main factors offered by the district court as justifications for the low number of blacks in supervisory positions were (1) the absence of blacks who had acquired sufficient experience in various lines of progression and (2) the objectivity and fairness of the supervisor selection system.

In *Rowe*, we rejected the employer's argument that the absence of blacks from salaried positions was due to the fact that "'experience' was essential and only long-employed Whites—and conversely, not the recently hired Blacks—had the 'experience' ". 457 F.2d at 358. There, that few blacks had "experience" was partially because the employer's seniority system perpetuated the effects of past discrimination and, as a result, blacks were primarily laid off during declines in manufacturing output. We agree that "*qualifications* are an employer's prerogative", but we also declared that the "incantation of 'experience' needs" could not be "automatically applied". *Id.* See also *Rodriguez*, 505 F.2d at 59.

The situation here is analogous to that in *Rowe*. Past discriminatory practices have either prevented or discouraged many of Scott's employees from transferring to many lines of progression and from gaining the experience Scott deems necessary in a supervisor. Our recent observation in *Stevenson* v. *International Paper Co.*, 5 Cir. 1975, 516 F.2d 103, 117 is directly on point:

> To the extent that the plaintiffs are ineligible for supervisory positions because they are not high enough in the lines of progression from which they were previously barred by discrimination, they are disadvantaged because of their employer's prior illegal practices.
>
> Under such circumstances, [the employer] . . . must demonstrate that the requirement of being high in a line of progression is compelled by business necessity. If it cannot be so justified, it cannot be used to foreclose a class member's consideration for a supervisory position.

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deed, the district court failed to make any statistical findings such as we use in text. Similar failures were suggested in *Rowe* to be "[i]ndicative, perhaps, of the Trial Judge's approach to the suit". 457 F.2d at 357 n. 16.

There was no finding in this case that an employee's being high in a line of progression, before promotion to a supervisor's job, was a business necessity. Most supervisors in the Maintenance Department, for example, are hired from outside the company rather than promoted from within. Even in the Production Department there has been at least one supervisor appointed who had no experience in the area placed under his control. Certainly, it would not seem like good business practice if Scott were to acquire all of its supervisors from among those employees who had no first hand knowledge of a particular line of progression. But it is equally unlikely (indeed, no one contends this is the case) that all supervisory personnel need experience in every job in a line of progression. With respect to prior discriminatees the district court should determine whether minimum residency periods, analogous to job-skipping within lines of progression, are feasible and, if so, establish them.

It is not merely the affected class which complains about Scott's selection of supervisors; it is a class including other black employees of Scott. It is appropriate, with respect to these employees, to scrutinize Scott's selection procedure. *Stevenson*. We turn again to *Rowe*.

In *Rowe*, there were five aspects of the promotion system that, taken together, rendered it inadequate in view of its discriminatory effect. These were (1) that the foreman's recommendation was the single most important factor

to promotion, (2) that foremen were given no written instructions pertaining to qualifications necessary for promotion, (3) that the "standards which were determined to be controlling [were] vague and subjective", (4) that hourly employees were not notified about vacancies or the necessary qualifications, and (5) that there were "no safeguards in the procedure designed to avert discriminatory practices". 457 F.2d at 358-59. Since the system employed by Scott is not significantly different from the system condemned in *Rowe*, we are constrained to hold that Scott's system must be modified.

First, it appears that low-level supervisors do constitute a crucial part of the promotion process, in that they provide a list of people who in their opinion should be considered for supervisory positions.[45] Second, there is no adequate safeguard against racial bias in the recommendations of low-level supervisors. Although the district court concluded that "middle level . . . officials . . . would be able to counteract . . . bias", the record does not adequately support this conclusion. Third, the first line supervisors did not have any written instructions specifying the qualifications desirable or necessary in a supervisor. Fourth, some of Scott's criteria for promotion can be described only as "subjective". Fifth, it is not clear from the record whether hourly employees were informed about vacancies in supervisory slots. The supervisor selection system here is indistinguishable from the system found faulty in *Rowe*. We do not question Scott's good faith in utilizing this system. A federal court attempting to enforce Title VII and protect the rights of minority employees must strive, however, to cut beneath the facade of good faith, counteract the "built-in headwinds" of racial bias, and prevent

[45] The vesting of such authority in first line supervisors has been censured in other cases. *See, e. g., Baxter* v. *Savannah Sugar Ref. Corp.*, 5 Cir. 1974, 495 F.2d 437, 442; *United States* v. *N. L. Indus., Inc.*, 8 Cir. 1973, 479 F.2d 354, 367-68.

discriminatory *consequences. Griggs* v. *Duke Power Co.*, 401 U.S. at 432, 91 S.Ct. at 854, 28 L.Ed.2d at 164.

The district court is instructed to reexamine Scott's selection procedures and order appropriate injunctive relief. Such relief may include, but need not be limited to, (1) formulating guidelines that explain the manner in which job-related objective criteria, such as absenteeism and number of reprimands, are evaluated, (2) formulating guidelines that explain the relative importance of subjective criteria found to be job-related, (3) formulating guidelines with respect to the experience generally necessary in each line of progression (and, with respect to the affected class, minimum residency periods, if possible), (4) requiring posting of supervisor vacancies and formal bidding, (5) devising a procedure by which Scott can recognize situations where first line supervisors' recommendations might be subject to racial bias, (6) setting affirmative action goals, consistent with Scott's business needs, that will help to reduce the psychological barriers resulting from Scott's past discrimination.[46]

VII. Back Pay

A. *Propriety of Back Pay Award*

The district court, after observing that "Scott did not actually intend to discriminate, and [that] the necessary discriminatory intent cannot be inferred from the fact that Scott continued its same course of conduct after having had a chance to observe its effects", held that the plaintiffs were not entitled "to any back pay award". 6 FEPC at 549. Even if discrimination in fact were proved, however, the court

[46] *See United States* v. *N. L. Indus., Inc.*, 8 Cir. 1973, 479 F.2d 354, 369; Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 Rutgers L.Rev. 465, 479 (1968); *cf. United States* v. *Sheet Metal Workers Local 36*, 8 Cir. 1969, 416 F.2d 123, 132.

held that it would not exercise its "discretionary" power to grant pay where, as in the instant case, discrimination

> arose only as an accidental and limited by-product of Scott's good faith and highly successful efforts to remove the remaining effects of past discrimination.

Id. at 550. Scott, in support of these "sound proposition[s] of law", points to the "numerous opportunities for almost all black employees who were long ago . . . the victims of discrimination . . .". The defendant unions argue, in support of the district court's result, that the OFCC's approval of the Memorandum of Understanding is a "special circumstance" in which a denial of back pay is permissible. Because the law in this Circuit and in the Supreme Court fundamentally conflicts with the denial of back pay in this case, we reverse this part of the lower court decision and remand for further proceedings.

The Supreme Court, in *Moody*, reviewed a district court denial of back pay on grounds that (1) there was no evidence of bad faith non-compliance with Title VII, and (2) the defendants would be substantially prejudiced by an award of back pay that was demanded contrary to an earlier representation. The Court recognized that the power to award back pay is, indeed, discretionary. Nevertheless, such discretion was not to be "left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles' ". *Id.*, 422 U.S. at 416, 95 S.Ct. at 2371, 45 L.Ed.2d at 296, *quoting United States* v. *Burr*, C.C.Va.1807, 25 Fed.Cases pp. 30, 35, No. 14,692d (Marshall, C. J.). The legal principles that guide Title VII back pay judgments were held to be the purposes of the Act to "achieve equality of employment opportunities" and to "make persons whole for injuries suffered on account of unlawful employment discrimination". *Id.*, 422 U.S. at 417, 418, 95 S.Ct. at 2372, 45 L.Ed.2d at 297. Back pay had an obvious connection with both of these guiding principles.

Most importantly, the Supreme Court held that the lack of bad faith was "not a sufficient reason for denying" back pay. *Id.* at 422, 95 S.Ct. at 2374, 45 L.Ed.2d at 299. The lack of bad faith merely "open[ed] the door to equity; it [did] not depress the scales in the employer's favor". The opposite conclusion would have undermined the "make whole" purpose of Title VII, a result inconsistent with the fact that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation". *Id., quoting Griggs* v. *Duke Power Company*, 1971, 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158, 164.

Here, Scott contends that the denial of back pay was not, in fact, based on Scott's good faith. The district court's opinion belies that contention, however. The denial was based, first, upon an erroneous view of Title VII law, a view that confused Scott's good faith efforts to comply with actual compliance. Second, the district court's observation that any discrimination was "accidental" again turns on a finding that Scott's motives were blameless, that Scott did not act in bad faith. But *Moody* scuttles the proposition that an employer's blameless motives protect it from back pay liability. See also *Mims* v. *Wilson*, 5 Cir. 1975, 514 F.2d 106, 109-10.

The Supreme Court's observation in *Moody* that the second reason proffered by the district court for back pay denial—that the employer would be unfairly prejudiced if back pay were granted—might, in the absence of the first reason, still be sufficient, lends support to the unions' argument. This Court has ordered back pay, however, where the OFCC had first approved various employment systems. See *Pettway*, 494 F.2d at 219, 251; *Johnson*, 491 F.2d at 1375-77, *rev'g on other grounds* S.D.Tex. 1972, 349 F.Supp. 3, 8, 16. We again hold that the OFCC's intervention does not constitute a sufficiently compelling reason to deny discriminatees the relief made possible by Title VII. Indeed, it is

likely that, in the absence of the OFCC's intervention in 1968, the defendants here would have been subject to even greater back pay liability than otherwise.

We note that in *Stevenson*, 516 F.2d at 11[illegible] recently remanded to the district court the general question of back pay in light of *Moody* and recent Fifth Circuit cases. It is more appropriate here, however, than in *Stevenson* to hold that back pay is necessary. In *Stevenson*, there was no sufficient showing of discrimination because the court erroneously limited the proof. Here, however, the record adequately demonstrates numerous violations of Title VII.

B. *Statute of Limitations*

Although the district court did not believe that back pay was appropriate, its holding that "[t]he statute of limitation applicable to this action is one year" is now important to this case. See 6 FEPC at 545, *citing United States* v. *Georgia Power Co.*, 5 Cir. 1973, 474 F.2d 906, *and* Code of Ala., tit. 7, § 26 (1958). The appellants did not object to his holding in their briefs on appeal, but at the request of the Court during oral argument, the parties filed post-argument briefs on this issue. The district court's holding here was correct.

In *Georgia Power* we held that a Georgia statute, providing a two year limitation period for actions brought for recovery of wages. Ga.Code § 3-704, applied to a back claim under Title VII. We observed that

> Title VII and similar statutes created new causes of action which did not exist at common law or under state statutes. In respect to those causes of action which have no close analogies in state law, civil rights statutes have generally been held governed by the limitation on liabilities created by statute. . . . However, where federal laws create rights to back pay as part of general remedial relief, courts have generally ap-

> plied the appropriate state statute of limitations governing actions for unpaid wages. . . .

474 F.2d at 924. Here, the Alabama statute of limitations for statutory wage actions, Code of Ala., tit. 7, § 26(1) (1958), has been held unconstitutional with respect to back pay actions under the Fair Labor Standards Act. See *Caldwell* v. *Alabama Dry Dock & Shipbuilding Co.*, 5 Cir. 1947, 161 F.2d 83, 86. *Caldwell* held § 26(1) unconstitutional because it created a one year limitation period for federal causes of action but did not affect the three and six year limitation periods applicable to "contract[s] of employment", implied or written, respectively. *Id.* at 85. The appellants argue that *Caldwell* requires us to apply either a three or six year period of limitation. This argument must be rejected.

Without citing either *Caldwell* or Alabama cases, this Court recently held that Code of Ala., tit. 7, § 26 (1958) provided the applicable limitation period in a Title VII back pay suit. See *EEOC* v. *Griffin Wheel Co.*, 5 Cir. 1975, 511 F.2d 456, 458 n. 4. Section 26 (a separate statute from § 26(1)) also provides for a one year limitation period, in actions "for a penalty given by statute to the party aggrieved" and "for any injury to the person . . . not arising from contract, and not herein specifically enumerated". The first question, however, is whether *Caldwell*'s holding § 26 (1) unconstitutional applies to this case. If it does not apply, *Georgia Power* requires us to use the § 26(1) period of limitations. If *Caldwell* continues to apply, however, we must then determine whether § 26 has incorrectly been used to supersede Alabama's three and six year limitation periods.

The continued validity of *Caldwell* is questionable. Our conclusion there that § 26(1) was unconstitutional was based upon the fact that the statute "discriminate[d] against rights and causes of action arising under a valid federal statute". 161 F.2d at 85. Although the statute nom-

inally applied to "[a]ll suits and actions for the recovery of wages . . . accruing under laws respecting the payment of wages, . . . specifically under the . . . Fair Labor Standards Act . . . and all other similar Acts", we noted that there [were] no wage and hour laws or other "similar Acts" in Alabama. Therefore, the effect of § 26(1) was to discriminate against federal causes of action. It appears, however, that Alabama has enacted a minimum wage law with respect to public contractors. See Code of Ala., tit. 26, §§ 375(8)-(24). Because § 26(1) can no longer be said to discriminate against federal causes of action, the rationale of Caldwell has been undermined.[47] Although Title VII is not a "law respecting the payment of wages" in the same sense that the FLSA is, it is sufficiently "similar" in its back pay provision to require application of § 26(1).

If *Caldwell* still applies, however, or if § 26(1) does not reach a Title VII type of statute, the district court was correct in holding that § 26 provided a one year limitation period. *Georgia Power* observed that "[t]he right to be free from discriminatory practices in employment is not analogous to the right of action on implied or unwritten contracts. . . . Indeed, it is the *failure* to contract for employment or promotion on an equal basis which gives rise to a Title VII action". 474 F.2d at 924; see *Buckner* v. *Goodyear Tire & Rubber Co.*, 5 Cir. 1973, 476 F.2d 1287, *adopting lower court opinion and aff'g* N.D.Ala.1972, 339 F.Supp. 1108, 1118 (Title VII). *Buckner* relied upon our reasoning in *Sewell* v. *Grand Lodge of International Asso-*

[47] This may explain the fact that § 26(1) has been cited twice by Fifth Circuit Title VII cases as the appropriate Alabama statute of limitations. See *Pettway* v. *American Cast Iron Pipe Co.*, 5 Cir. 1974, 494 F.2d 211, 258; *Johnson* v. *Goodyear Tire & Rubber Co.*, 5 Cir. 1974, 491 F.2d 1364, 1379 n. 49. These cases did not, however, mention *Caldwell*. In *Buckner* v. *Goodyear Tire & Rubber Co.*, N.D.Ala. 1972, 339 F.Supp. 1108, 1117, *aff'd*, 5 *Cir.* 1973, 476 F.2d 1287, the district court recognized that § 26(1) had been declared unconstitutional without mentioning the public contractor/minimum wage law.

ciation of Machinists, 5 Cir. 1971, 445 F.2d 545, *cert. denied*, 404 U.S. 1024, 92 S.Ct. 674, 30 L.Ed.2d 674. There we held that § 26 applied to a complaint, under the Labor Management Reporting and Disclosure Act,[48] alleging wrongful discharge, for the exercise of first amendment rights, from a union position. We drew the distinction between rights arising ex contractu and rights arising ex delicto and held that, since there was no contract alleged as the basis of the plaintiff's rights, the ex delicto statute of limitations, § 26, barred the action. *Id.* at 549-50. See also *Brotherhood of Locomotive Firemen* v. *Mitchell*, 5 Cir. 1951, 190 F.2d 308, 313 & n. 7, which applies § 26 to an employee's suit against a union for violation of the duty of fair representation. These cases supply ample support for *Griffin's* holding that § 26 is applicable to Title VII.

Finally, we need to determine whether *Caldwell*'s observation that Alabama uses its three and six year limitation periods in claims arising under "contracts of employment" is apposite. The Alabama law, with respect to the distinction between rights ex contractu and rights ex delicto, was correctly stated in *Sewell*. See, e. g., *Chambers* v. *Birmingham Trust & Savings Co.*, 1936, 232 Ala. 609, 168 Co. 893; *Adler* v. *Miller*, 1928, 218 Ala. 674, 675, 120 So. 153, 154; *Blythe* v. *Enslen*, 1919, 203 Ala. 692, 85 So. 1, 2. *Sewell* is not inconsistent with Caldwell. Where a statute sets the amount of compensation due an employee, the statute may be read into the employment contract, and a suit for back wages is based upon contract. See *State ex rel. Hyland* v. *Baumhauer*, 1942, 244 Ala. 1, 12 So.2d 326, 331.[49] This would be the case under the Fair Labor Standards Act, the statute

[48] 29 U.S.C. §§ 401 *et seq.*

[49] See also *City of Anniston* v. *Dempsey*, 1950, 253 Ala. 597, 45 So.2d 773, 776; *Kirkland* v. *Jefferson County*, 1943, 244 Ala. 69, 12 So.2d 347. These are similarly distinguishable from a Title VII cause of action, as the plaintiffs sought to recover back pay based upon a definite salary for which they may fairly be said to have contracted.

dealt with in *Caldwell*. Title VII provides for back pay, but does not prescribe what that pay shall be. Therefore, Title VII is not to be understood as "implied" in the plaintiffs' employment contracts. The employees' right to back pay arises out of the duty not to discriminate imposed by Title VII, not out of a contract.[50]

VIII. Will Robinson

Will Robinson was temporarily discharged from his job for a series of mistakes and refused to return to work on Scott's terms. The district court found that Robinson failed to prove that his treatment "was . . . motivated by racial discrimination against him". 6 FEPC at 544. Robinson urges on appeal that he is entitled to a remand in light of *McDonnell-Douglas Corp.* v. *Green*, 1973, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668.[51] Specifically, Robinson argues that reconsideration is necessary in view of the Supreme Court's dictum that an employer's historical attitude to minority employment might be relevant to determining whether the employer's articulated reason for its behavior was merely a pretext to hide that behavior's actual discriminatory basis. *Id.* at 804-05, 93 S.Ct. at 1825-1826, 36 L.Ed.2d at 678-679. We affirm this part of the lower court's judgment, for we find no reason to believe that the judgment would be different after *Green*. The history of the Scott paper mill was before the trial court when it decided Robinson's case. As in *Peters* v. *Jefferson Chemical Co.*, 5 Cir. 1975, 516 F.2d 447,[52] our review of the entire record satisfies us that the district court weighed the evidence before it properly. The evidence sufficiently supported the finding that Robinson was discharged legitimately.

[50] We do not decide whether as the appellants contend, Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g) allows back pay for two years preceding the filing of a complaint, regardless of the state statute of limitations, as long as the suit was timely brought. In denying a petition for rehearing or rehearing en banc, the Court in *EEOC* v. *Griffin Wheel Co.*, 5 Cir. 1975, 511 F.2d 456, responded to an argument similar to that made here by allowing the district court to consider it on remand. In light of the district court's greater familiarity with Alabama law, we do the same.

[51] The Supreme Court held there that the plaintiff has the initial burden of establishing a prima facie case of racial discrimination, which may be accomplished by showing that the plaintiff was a member of a minority, that he was qualified for a position, and that a nonminority individual, with equal or lesser qualifications, received a job preferentially. Then, the employer has the burden of articulating "some legitimate, nondiscriminatory reason" for the employee's rejection. Finally, the plaintiff has an opportunity to prove that the employer's articulated reason was merely a pretext for discrimination. *See* 411 U.S. at 802-05, 93 S.Ct. at 1824-1826, 36 L.Ed.2d at 677-679.

IX. Attorney's Fees

In light of our holding that the plaintiffs substantially proved most of the Title VII violations they alleged,[53] we do not disturb the district court's award of attorneys' fees against the defendants,[54] nor do we discuss whether that award would have been proper had we completely affirmed

[52] See also *Wells* v. *Ramsey, Scarlett & Co.*, 5 Cir. 1975, 506 F.2d 436; *Long* v. *Sapp*, 5 Cir. 1974, 502 F.2d 34; *Resendis* v. *Lee Way Motor Freight, Inc.*, 5 Cir. 1974, 505 F.2d 69, 72.

[53] We recognize, of course, that the individual plaintiff Will Robinson cannot be said to have directly prevailed in this case. Nevertheless, an individual plaintiff may be entitled to reasonable attorneys fees, despite his failure to prove his own claim, when the class he represents is successful. See *Clark* v. *American Marine Corp.*, E.D.La. 1970, 320 F.Supp. 709, 710, *aff'd*, 5 Cir. 1971, 437 F.2d 959; *Parham* v. *Southwestern Bell Tel .Co.*, 8 Cir. 1970, 433 F.2d 421, 429-30; *Reed* v. *Arlington Hotel Co.*, 8 Cir. 1973, 476 F.2d 721, 726, *cert. denied*, 414 U.S. 854, 94 S.Ct. 153, 38 L.Ed.2d 103; *United States* v. *United States Steel Corp.*, N.D.Ala. 1973, 371 F.Supp. 1045, 1063, *partial denial of back pay vacated and case remanded*, 5 Cir. 1975, 520 F.2d 1043; *Fogg* v. *New England Tel. & Tel. Co.*, D.N.H. 1972, 346 F.Supp. 645, 651.

[54] See 42 U.S.C. § 2000e-5(k).

the substantive decisions of the district court. That portion of the district court's judgment relating to attorneys fees is affirmed.[55]

In conclusion, the lower court's decision is AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED for proceedings consistent with this opinion.

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[55] We note that in *Baxter* v. *Savannah Sugar Ref. Corp.*, 5 Cir. 1974, 495 F.2d 437, 447, we vacated an award of attorneys fees where the case was to be remanded for further proceedings in the district court. This is not, however, authority for vacating the award in the present case. In *Baxter*, the prevailing party attacked the award as insufficient, and this Court vacated because of an insufficient record. Here, although we also remand, there is no issue concerning the adequacy or inadequacy of the award. There is, therefore, no need to remand for clarification or supplementation as there was in *Baxter*.

APPENDIX B

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

No. 6838-71-H. August 27, 1973.

ELIJAH WATKINS, et al., *Plaintiffs*

v.

SCOTT PAPER COMPANY, et al., *Defendants*.

HAND, D. J.: This cause originated on September 14, 1971 when plaintiffs filed a class action pursuant to Rule 23, Federal Rules of Civil Procedure, alleging the defendants were guilty of violating Title 42, United States Code, et seq. and Title 42, Section 1981. Named plaintiffs are presently employees of defendant Scott Paper Company at its mill located in Mobile, Alabama. They, individually, and the class they represent, are members of, or are represented by, the defendant United Paperworkers International Brotherhood of Pulp, Sulphite and Paper Mill Workers.

Defendant Scott is a company engaged in the manufacture and sale of pulp and paper products and is an employer within the meaning of 42 U.S.C., Section 2000e(b).

The defendant International and local unions have been duly certified by the National Labor Relations Board as the statutory representatives and the sole and exclusive employees of defendant Scott at its Mobile plant, except for certain electricians, instrument men, and power plant employees, who are represented by the International Brotherhood of Electrical Workers and its Local 2129, who are not parties to this suit. The aforesaid unions have represented the hourly paid employees at Scott throughout the period relevant to the issues in this lawsuit.

By Order entered July 9, 1972, this case is being maintained as a class action on behalf of all black employees of

defendant Scott at Mobile, Alabama, who were employed there on May 10, 1971, and all black employees hired since that date, and all future black employees, excluding all unsuccessful job applicants.

Prior to trial the parties worked out an extensive pre-trial stipulation of facts and list of disputed issues which was originally filed with the Court on October 17, 1972, and then refiled, with revisions, on January 10, 1973. Trial of this case began January 29, 1973, and continued on an intensive schedule for over one week; another full day of expert testimony concerning the validity of the employment tests used by Scott was heard February 15, 1973. In all, plaintiffs called 43 witnesses (including one Scott official) and defendant Scott called 23 witnesses. The unions did not call any witnesses. Additionally, some 120 documents were received in evidence.

There are presently about 3,440 employees at Scott's mill of whom about 780, or 23 percent, are black. In 1962, 15 percent of the total employees were black. In 1969, shortly after the adoption of the "Memorandum of Understanding",[1] 19 percent were black. (Plaintiffs' Exhibit 17). For the past several years, between 40 and 50 percent of Scott's new hires have been black, although the percentage of blacks in the Mobile County work force is only 27.9 percent. (Plaintiffs' Exhibit 32). As a result, about 30 percent of all hourly employees now working at the mill are black.

By agreement of the parties the following matters are not alleged by plaintiffs to be in violation of the law, and thus these issues, which would be involved in this case if there were such allegations, are foreclosed from further litigation:

Scott's current policy for placing new employees in job assignments;

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[1] Identified infra.

Distribution of overtime;

Distribution of holidays and vacation, leaves of absence, health benefits;

Application of the seniority rules governing promotions and demotions as established by the contract;

Promotion of hourly maintenance workers;

Applications or interpretation of Mill Rules;

Promotion or transfers of salaried personnel from one salaried position to another;

The lawfulness of segregated locals or their subsequent merger;

Availability and use of physical facilities by all employees; and

The processing of day-to-day grievances of employees.

Additionally, in view of the Court's Order defining the class represented by plaintiffs, Scott's general hiring practices are not in issue.

These matters listed above concern the great majority of the rules which govern the conditions under which all employees at the Scott plant work. Plaintiffs' entire case, in fact, concentrates on the effect a few special work rules have had on a relatively small number of about 164 black employees who were originally hired, prior to 1968, into jobs which were historically black jobs, even though most such jobs now contain white as well as black employees. These are the affected class members who have never transferred out of historically black jobs, as have many other affected class members who were also originally hired into such historically black jobs. (See defendant Scott's Exhibit 46). These 164 black employees represent only about 21 percent of all of Scott's black employees. The principal, narrow issue raised by plaintiffs is whether defendant Scott has taken an adequate number of special,

affirmative steps—there being no dispute that Scott has taken many such steps—sufficient to afford this relatively small number of black employees all possible opportunity to leave their present jobs for new jobs in other, once-white (but now fully integrated) departments. Two other issues raised by this case are (1) whether the standards used to select applicants for Maintenance craft helper jobs are discriminatory and (2) whether the criteria used to select first line supervisors from among present hourly employees discriminated against blacks. A final issue concerns Scott's decision to discharge Mr. Will Robinson on the alleged ground of poor workmanship.

I. Production Jobs

Preamble

In 1954 Scott acquired its first paper mill in the South by purchasing the nucleus of the present pulp and paper mill complex, (constructed in 1940) from Hollingsworth & Whitney. The original mill produced pulp, some of which was then converted into finished flat grade paper by the Printing and Converting (P&C) Division. In 1959 the company significantly expanded its operation by the construction of a new tissue mill to manufacture finished paper products. 500 new employees were added at this time. The Tissue Division is now larger in size than the P&C Dvision.

As this Court is aware from having toured International Paper Company's Mobile facilities, another paper mill of approximately equal size, the manufacturing of paper from wood is a large and complex process. The Scott mill operates continuously at full speed, 24 hours a day, seven days a week. Wood logs are first reduced by a high speed chipper to chips and then cooked, washed, screened and bleached until pulp of various different consistencies is obtained. The pulp is then piped to one of two paper mills where it is converted to a large variety of different kinds of paper.

Many of the high-skilled jobs can be very dangerous, or cause great economic loss to the company, if not done properly. The complexity of the machinery used by Scott at the Mobile plant was highlighted by Mr. William Krause, Manager of the Maintenance Department, who testified that he now seeks for even first line supervisory jobs in the Maintenance Department college graduates with degrees in engineering. Mr. James Coil, who functions as principal assistant to the mill manager and has been with the mill since it was first built, estimated that the present replacement cost of the mill would be about 250 million dollars. Mr. Vince Russo, Manager of the P&C Division, and Mr. John Speier, Manager of the Tissue Mill, estimated that each paper machine, along with the necessary support equipment associated with a paper machine, is worth between $24 and $32 million. The yearly payroll for the plant is $37 million. Yet a paper machine, which may be capable of operating as fast as 55 miles per hour, is normally operated at any one time by a crew of only 5 or 6 papermaker employees.

Most production jobs are in lines of progression, in which seniority governs orderly promotions from one job in the line to the next; a system which is necessary in the paper industry for the safe and efficient running of the plant. Except for a few exceptions, plaintiffs never questioned the lawfulness of this system. The lines of progression at Scott have evolved in response to changes in the manufacturing process and in response to changes requested in collective bargaining sessions. The rules governing promotions, transfers, and other matters governing an employee's work assignment likewise reflect the business necessity of having a relatively stable and well-trained work force.

The natural consequences of the use of lines of progression and the use of seniority as the basis for determining promotions is to require employees to weigh a number of factors in deciding whether to move from job to job within the plant. For instance, as the testimony of Mr. John Henry

White illustrated, an employee may be faced with the choice of accepting immediately a new job with significantly higher wages, with the knowledge that he will never be able to advance further in that line, or continuing in his present line of progression with the hope of eventually rising to even higher paying jobs at the top of that line. This is not an uncommon situation in industry and elsewhere in life. Plaintiffs failed to introduce any evidence challenging the reasonableness and necessity of Scott's use of lines of progression, or its practice of using seniority as an objective standard for determining transfers, promotions, layoffs, or the like. As found above, the issues raised by plaintiffs in this case are narrow ones, involving the application of Scott's work rules to a minority of black employees hired prior to 1969.

A. *The Situation Prior to 1963.* 1. Scott has never had a corporate policy of discriminating against blacks. When the mill was originally started in 1940 by another company, Hollingsworth & Whitney, blacks and whites were assigned to different jobs, as was of course true throughout the South and elsewhere in the country. Consequently, when Scott acquired the plant in 1954, segregation of employees had become a firmly entrenched part of the plant's job structure. Scott acknowledged the problem and sought ways to achieve equal employment opportunities for all.

2. As of 1962, the following jobs at Scott's Mobile mill were all black:

Woodyard and Woodroom: Laborer, Crane Slingman, Woodyard Crew Leader, Sorter, and Chipper Feeder.

Recovery Room: Lancer.

Bulk Handling: Laborer, Material Handler and Crew Leader.

General Grounds/Maintenance Yard: Laborer, Janitor, Crew Leader, Gardener, Conveyor and Chemical Man, Track Worker and Track Man.

P&C General Services: Cleanup, Starch Maker, and Starch Maker Helper.

P&C Machine Roll Finishing and Shipping: Laborer and Car Loader and Bracer.

Tissue Traffic Services: Baler and Laborer.

Stores: Material Handler.

Of the jobs listed above, all of the following now contain white as well as black employees (or are jobs that the company no longer fills) except for the following ten jobs, accounting in total for only 33 employees:

Woodyard: Chipper Feeder (8 employees). Since 1967 there has been only one opening in this job which is the top job in one of the two Woodyard lines of progression. While there are whites in the line, none of them yet have the department seniority needed to qualify for this job.

Recovery Room: Lancers (4 employees). Three of the four Lancers are affected class members who have elected to transfer into this job at some date subsequent to the Memorandum of Understanding.

Bulk Handling: The Crew Leader (Chemical Warehouse Man) (1 employee). In 1971, this job was placed in the historically white P&C Bulk Handling line of progression. (See *supra* Finding IF-3).

General Grounds: Gardener (1 employee); Conveyor and Chemical Man (1 employee); Track Man and Track Worker (7 employees). The incumbent in the Conveyor and Chemical Man job, an affected class member, elected to transfer to the job in 1972. The Track Man and Track Worker jobs are now part of a historically white line. (See *supra* Finding IF-3).

P&C Services: Starch Maker (4 employees); Starch Maker Helper (4 employees). (See *supra* Finding IF-4 (b)).

Stores: Material Handler (3 employees). (See *supra* Finding IF-4(c)).

3. The following 7 jobs which have been created since 1962 were originally filled by blacks. (Other jobs have, of course, also been created since 1962):

(a) The job of Loader Operator has been filled since its inception by the same incumbent. When the job was created it was placed in a "Y" off Woodyard No. 2 and filled by the most senior employee in the line, who was black. The job pays $4.180 an hour, which is more than the highest paying job in the line.

(b) In 1966, in accordance with the wishes of Local 613, the job of Loader Helper, which is under the job of Loader Operator in the line of progression, was filled by the most senior employee in the Laborer classification in Woodyard No. 2 (see Exhibit J to defendant Scott's Answer to plaintiffs' interrogatories).[2]

(c) When the job of Salvage Man was created to run what was hoped would be a substantial new operation, it was placed under the jurisdiction of Local 613 in order to increase the number of jobs above the base level which were under the jurisdiction of that historically black union. A Salvage Man Helper job was later created.

(d) The Conveyor Attendant job in Woodyard No. 2 is not a new job, but only a new name for the job of Pit Man which was already in the line of progression. Accordingly, the job was filled by the employees who were previously denominated as Pit Men. The eight affected class members who now fill the job (some of whom have been in the job, or its predecessor, for as long as 15 years) have all refused promotion to higher paying jobs. The current seniority list shows that the first vacancy in the job will be filled by a white.

[2] All of these exhibits were received in evidence although not given separate numbers.

(e) Filter servicing was originally performed as an incidental chore by maintenance men with other additional responsibilities. At the union's insistence, this duty was put into a new job, Filter Service Man. It was filled by a black employee who has held the job since 1967. Like the Salvage Man job, it pays better than a base level job. In 1969 the Core Salvage Man job was created, given a wage rate that was above the base level, and placed below the Filter Service job in a line of progression (Tissue Mill Services). Although originally filled in 1969 by a black employee, the job has been filled since 1970 by a white.

4. As of 1962, all jobs, other than those listed above, were all-white. Of the 30 historically white lines of progression, 26 now contain black and white employees. There have been 12 openings in the remaining four all-white lines since 1969, and in each case there were a substantial number of affected class members who could have transferred to the line had they applied. There was no evidence that any blacks had even been unfairly deterred by Scott from applying for any of these jobs.[3]

5. Until 1970, when it merged with formerly all-white Local 423, Local 613, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL-CIO, an all-black local union, had jurisdiction over all the black jobs listed above. The defendant local unions and Local 2129, International Brotherhood of Electrical Workers, AFL-CIO, or its predecessor, were all-white local unions and had juris-

[3] Blacks have had four opportunities to transfer to the Causticizing lines since the Memorandum and five opportunities to transfer to the Bleach Plant Line. In each case there were, at the least, between 8 and 75 affected class members alone who could have transferred to a job in the line had they applied. In the case of By-Products and Chemicals (a three man line) there has been only one opening since the Memorandum, and in the Stores line there have been only two openings. Nevertheless, at least 17 to 20 affected class members had the necessary seniority to get each of the jobs had they applied. (Defendant's Exhibit 7).

diction over the hourly paid white jobs. There are no issues relating to the lawfulness of segregated locals or their subsequent merger in this action, nor is there any issue concerning the processing of day-to-day grievances of black employees by the defendant unions in this action.

6. In talking with employees in a series of meetings in Mobile in the spring of 1955, Mr. Harry Dunning, Scott's Vice President for Manufacturing, pledged Scott to a policy of equal employment opportunities for all employees. Although the record is silent as to the specific steps Scott took prior to the fall of 1961 to advance equal employment opportunities, no evidence was introduced suggesting that during this time any black employee applied for a transfer to an all-white line of progression. The fact that Scott moved so promptly when the 1961 Executive Order was issued (see below) can probably be traced to the very policy Mr. Dunning had earlier announced.

Since 1961 Scott had been recognized throughout the South as a leader in the field of equal employment, and Professor Herbert R. Northrup, author of a recognized work on equal employment in Southern paper mills, "The Negro in the Paper Industry," praised Scott's performance, saying that Scott had the best record of all the paper mills in the South.[4]

B. *1962-63 Changes.* 1. In 1961 President Kennedy issued Executive Order 10926. By no means the first such order dealing with equal employment by Government contractors, 10926 set out for the first time a series of specific penalties for noncompliance and was the first such order to

[4] Professor Northrup's book, and his assessment of Scott's record, is described in further detail in the paper "Equal Opportunity, One Man's Evaluation" contained in defendant Scott's Exhibit 6. The paper cites Dr. Northrup's conclusion that following the company's acquisition of the mill in 1954, "Scott has moved to integrate these facilities and has made particular progress since 1961 when the company decided that it would be required to take steps out of line with the southern paper industry tradition".

center ultimate enforcement responsibility in a single unit, the President's Committee on Equal Employment Opportunity.[5] In November 1961 a resolution adopted by the Executive Committee of Scott Paper was forwarded to all Plant Managers, wherein Scott's policy of achieving equality of opportunity for all was reiterated. All Plant Managers were instructed to notify the appropriate local official of each labor union, as well as the appropriate international representative of each union, of this policy, as well as to publicly post notice of such policy. (Defendant Scott's Exhibit 1).

In 1962 Scott officers from its Philadelphia headquarters and local management conferred on several occasions with officials of the international and local unions representing employees at the Mobile mill. In these discussions Scott informed the union that the jobs in formerly all-white lines of progression would be available to black employees wishing to transfer.

Following this announcement black employees could transfer to formerly white jobs without meeting the educational and testing requirements imposed a year later on all employees and all applicants. Scott also announced it would desegregate its bathroom, cafeteria and other service facilities. Written agreements were obtained by Scott from the unions wherein the unions pledged themselves to cooperate in the policy changes.

2. When the agreement with the unions failed to stimulate transfers by blacks to historically white lines of progression, Scott determined that it would place a few blacks in historically white jobs to demonstrate that the company meant what it had said about equal opportunities for black

[5] However, the penalties were never invoked. Nor was enforcement vigorous until at least 1965, when President Johnson issued Executive Order 11246 disbanding the Committee and assigning responsibility for the first time to an operating department, the Department of Labor. OFCC was formed as a unit of the Department later the same year.

employees. At about the same time Scott adopted uniform, objective standards applicable to all employees, whether white or black, who wished to transfer to new lines of progression, thus attempting to eliminate the possibility that racial discrimination could be a factor in deciding who would or wou'd not be transferred. These requirements were a high school education and a specified passing score on a standardized test.

3. For 15 years Scott has generally required its new employees to have a high school education and to pass some kind of test. Black employees, however, did not need to have a high school education or pass the test until 1963, when blacks and whites were put on an equal footing.

The high school and test requirements were adopted in 1958 at the time Scott was hiring 500 new people, (nearly doubling its work force)[6] to train to man the new Tissue Mill then being constructed. The requirements were adopted because Scott had found them helpful in selecting the best people for training when it started up its new paper mill in Everett, Washington. Initially, the minimum scores on the test were used as guidelines rather than as an absolute cut-off, although Scott usually hired applicants whose scores were below the guidelines only when, for example, the applicant had related work experience in a previous job and good references. In 1963, Government officials had encouraged Scott to eliminate completely the practice of making exceptions to the guidelines, and as a consequence Scott began using rigid cutoff scores to insure objectivity.

4. At the same time Scott determined that all present employees, both white and black, seeking to transfer to other jobs at the plant would be required to meet the same educational and testing requirements Scott had begun im-

[6] Of the approximately 2500 hourly employees now employed at the mill, 1050, or 42 percent, work in the Tissue Mill. The Tissue Mill operation also inevitably increased the need for workers in such other departments as Maintenance.

posing on job applicants. New, more sophisticated equipment was coming into use at the mill and that the reasons that justified the new requirements for job applicants were equally applicable to employees transferring to lines of progression in which they would have to deal with the newer equipment and faster processes. There was no showing that this requirement was discriminatory.

It is true that at the time this new requirement was imposed there were some employees already in lines of progression who had failed to pass a test or earn a high school diploma; however, these employees were able to make up for this by growing with the job as new machinery was adopted. It was not shown, however, that these non-high school graduates are equal in performance with those who had finished high school. An employee entering the line for the first time would, of course, not have this advantage of prior training, so that his lack of education would be a far more serious obstacle to his learning the job.[7]

5. In 1963 it became apparent to Scott that despite its efforts, black employees were not transferring to historically white lines of progression. Therefore, unilaterally in March 1963 Scott placed one black employee in each all-white union's jurisdiction. Mr. John Henry White was transferred on March 10, 1963, to the job of Utility Man in the Power Plant; Mr. Cecil Woodson was transferred on March 10, 1963, to the job of Broke Helper in the P&C Mill; Mr. Clifton McNeil was transferred on March 11, 1963, to the job of Brickmason C in the Maintenance Department; and Mr. W. J. Morris was transferred on March 11, 1963, to the job of Truck Driver Dempster Dumpster for training for Outside Truck Driver in the P&C Traffic Division, to which job he was transferred on November 3, 1963. At the same time Scott increased its efforts to publicize its equal employment policies by notifying the

[7] See affect of Memorandum of Understanding on point raised here as more fully set forth later in this opinion.

Alabama State Employment Service and others outside the plant. (See defendant Scott's Exhibit 2.) The evidence introduced showed, and the Court finds, that this was in fact the result achieved. Plaintiffs' position is that Scott, contrary to its announced intent and actions, intended to adopt a policy of tokenism. However, to the contrary, the actions taken between 1961 and 1963 broke the initial ice and began to give momentum to Scott's program. Far from having a policy of tokenism, Scott continued in the next several years to pursue actively its employment policies so that by 1965 123 of the black employees working at the plant were in jobs which were not historically black jobs, and by May 1961, all but 195 of the 507 black employees then at the plant had worked in lines which were not historically black.

C. *Events 1963-69.* 1. Scott follows the common practices of using job or department seniority to determine order of priority for promotion within any line of progression, pursuant to its collective bargaining agreement. When an employee transfers into a different department, he begins accruing seniority in that department and, after 60 days, loses his right to return to his former job. Also, he would typically enter the new department at or near the base wage rate. This meant that once an employee accrued significant seniority in a department, he would have to weigh carefully a decision to shift to a different department, especially if he had moved up one or more steps above the base wage rate. Yet the testimony shows there was and is a great deal of such department shifting. Defendant Scott's Exhibit 7 shows that from May 1969 to September 1972 there were 845 job postings for historically white jobs in lines of progression and a large number of these vacancies were filled by employees who had been employed at the mill for a number of years. The less desirable vacancies were filled by employees who had been employed at the mill for a short time or recently or newly hired employees. These rules applied, of course, to black and white employees alike between 1963 and 1969. During that period, the number of

black employees in formerly all-white lines of progression rose from 123 to 312.

2. Under the collective bargaining agreement signed in September 1968, Scott for the first time began to post, plant-wide, all vacancies in entry level jobs in the Production and Maintenance departments. Before that, job vacancies were not announced formally to the employee population. Those employees interested in transferring into another department had to go to the Personnel Office and sign an application form which remained active for ninety days.

3. On July 1, 1968, Scott switched from the use of the Kopas test as a screening device to the Wonderlic test at the suggestion of the Office of Federal Contract Compliance. OFCC indicated at that time that Kopas had not been shown to be a reliable predictor of job performance but Wonderlic had proved to be valid in a variety of circumstances, in particular at the neighboring International Paper Company mill.

4. A few structural mergers of black jobs into white lines of progression were negotiated with the company and the defendant unions by all-black Local 613 before its charter was withdrawn by the International Brotherhood of Pulp, Sulphite and Paper Mill Workers late in 1970. These mergers occurred in the Tissue Traffic, Woodyard and P&C Traffic Departments.

5. In 1965, the job known as the Case Handler or Car Loader and Bracer job in the Tissue Mill was merged with the Repack Handler job, the entry level job in the Distribution Center. As a result, employees in the historically black Case Handler job were permitted to enter the Distribution Center line of progression irrespective of seniority and educational requirements and were then permitted to advance in that line according to the collective bargaining agreement. In 1966 the Distribution Center line of progression was split into two lines, the Tissue Mill Services line

and the Tissue Distribution Center line. Consistent with Scott's uniform practices under the collective bargaining agreement all employees in the line were at that time given the choice of transferring to the new line or not in the order of their contract seniority. Black employees who had entered the line in 1965 as a result of the merger were accorded department seniority from the time they had originally begun work in the department in the Case Handler job, even though at that time the job was not part of the line. Both black and white employees chose to go into both of the two lines. As defendant Scott's Exhibit 46 shows, 8 of the 38 employees now in the Mill Services Division (General Handling Tissue) are black, including seven affected class members. Two of these seven affected class members transferred to the line in 1966 at the time the line was organized. The seniority list for the Distribution Center line (Tissue Shipping) shows that there are still 26 whites in the line who have been in the line since prior to the reorganization of the line in 1966.

6. On or about March 11, 1966, the jobs of Loader Operator and Loader Helper were established and placed in the Woodyard No. 2 line of progression as a separate leg above the job of Woodyard Laborer. Mr. Blanchard Knight, the only person ever to have filled this job, testified, however, that he began working as a Front End Loader in 1963. The Front End Loader job evolved into the present Loader Operator job. Mr. Knight further testified that, at $4.180 an hour, the job pays more than any other job in the Woodyard No. 2 line .The arrangement by which the Loader Helper, working under the Loader Operator, is filled by the most senior qualified Woodyard Laborer was negotiated with, and approved by Mr. William Drakes, then President of Local 613. (See Exhibit J to defendant Scott's Response to Plaintiffs' First Set of Interrogatories). Mr. Knight did not in his testimony complain about his present position.

7. Beginning April 10, 1967, employees in the all-black Car Loader and Bracer job in the P&C Traffic Department were given the opportunity to transfer into the bottom job of Second Roll Wrapper in the virtually all-white P&C Machine Roll, Finishing and Shipping line of progression irrespectively of seniority and education requirements. (See Exhibit K to defendant Scott's Response to Plaintiffs' First Set of Interrogatories). Originally those wishing to transfer into the line were required to meet the test requirements, but this was later dropped. When employees entered the line of progression their department seniority was back-dated from the time they had begun working in the historically black Car Loader and Bracer job. Subsequently, the Car Loader and Bracer job and the Laborer job in the P&C Machine Roll Finishing and Shipping Department were made an integral part of the line of progression so that employees now advance automatically in the line solely on the basis of the collective bargaining agreement. Mr. Giffen estimated in his testimony that as a result of the restructuring of the Tissue Distribution Center and P&C Traffic line of progression between 50 and 60 black employees in historically black jobs transferred to historically white lines of progression without having to meet the transfer requirements otherwise applicable to all employees, black or white, seeking to transfer to a new line of progression.

D. *The Memorandum of Understanding: Its Development and Terms.* 1. Although prior to 1968 Scott was told by OFCC and the General Services Administration that it was doing a good job, Scott, along with most of the other companies in the Southern pulp and paper industry, was informed in 1968 by OFCC of the need to negotiate changes in its collective bargaining agreement with the defendant unions for the purpose of further promoting the employment opportunities of blacks. This evolved from the concept, first judicially ratified in March 1968 in the Crown Zellerbach litigation in Louisiana, that a neutral seniority

system could be illegal if blacks had historically been restricted to less desirable jobs, and if their ability to rectify their status was impeded by the seniority system. See *Local 189* v. *United States*, 416 F. 2d 980, 982 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970). Put differently, it came to be recognized that the law was violated by a non-discriminatory system if blacks were still feeling the effects of a prior (even pre-Title VII) discriminatory practice. International Paper was the first to be approached by OFCC, and its so-called "Jackson Memorandum" was generally used by the rest of the pulp and paper industry in the South as a model for changing their labor contracts. The Jackson Memorandum of Understanding was signed on August 2, 1968, by International Paper Company, Southern Kraft Division, and its unions.

2. In May 1968, GSA contacted Scott management (See defendant Scott's Exhibit 3), claimed that Scott was not in compliance with Executive Order 11265, and told Scott that implementation of each of eight specific "fundamental" changes would be considered a condition to future Federal contract eligibility. Scott and the defendant unions were at that time engaged in general contract negotiations which extended through September 1968.

3. Scott contacted officials of IP's Southern Kraft Division and obtained a copy of the Jackson Memorandum, which they used as a guide to draft Scott's Memorandum of Understanding.[8] The "Jackson Memorandum" was used as a model because union officials were already familiar with the terms of the agreement and had already agreed to them in conjunction with agreements negotiated at other plants. By November 1968 the terms of the "Memorandum of Understanding" were substantially finalized following negotiations between Scott, the OFCC, GSA and the defendant unions, but were made subject only to ratification by the membership of the local unions.

[8] Plaintiffs Exhibit 5.

4. Scott's "Memorandum of Understanding" defines an "affected class" of black employees as all Negroes employed on or prior to March 1, 1963, and all Negroes employed between March 1, 1963, and the "Memorandum of Understanding," who were placed initially in a job or line of progression formerly considered an all-black job or line of progression. The Memorandum made it easier for black employees in historically black jobs or lines of progression to transfer to historically white lines, and provided means whereby such employees, once in such lines, would be able to advance more rapidly than whites by utilizing their mill seniority when competing against whites for promotion, demotion, lay-off, and recall in production departments.[9] Although the Memorandum did not originally apply to temporary promotions, it was altered in November 1970 to cover temporary promotions at OFCC's request. In conjunction with Scott's agreeing to the Memorandum, Scott designated approximately 300 employees as members of the affected class. It included in this category black employees hired initially into historically black jobs even if they were by then already in or previously had been in historically white jobs. As of the time the Memorandum was implemented approximately one-third of the employees designated as affected class members had already worked in historically white jobs. There were approximately 200 black employees who had been hired after 1963 and placed in historically white jobs who were not designated as members of the affected class.

5. Union representatives took the "Memorandum of Understanding" back to their respective locals for ratification by vote of their membership. The formerly all black Local 613 membership voted to approve adoption of the Memorandum and the President of Local 613, William

[9] As of October 1972, the Memorandum had permitted affected class members on 152 separate occasions to advance to better jobs ahead of 219 other employees who had more contract but less mill seniority (See Amended Pre-Trial Order, Agreed Facts, No. 47).

Drakes, so informed Scott orally; however, Local 423 (who has jurisdiction over most Shipping, Pulp Mill, and Woodyard jobs, and with whom Local 613 was subsequently merged) voted to reject it and none of the representatives of the other local unions at Scott ever advised Scott that their locals had voted to approve it.

6. Section 2 of Paragraph A of the Memorandum required Scott to contact affected class members to determine whether they were interested in transferring to some other line of progression and, if so, which lines, so that Scott could automatically consider the employee for any opening in such line. This provision thus required Scott to conduct the interview prior to actually putting the Memorandum into use. Mr. Leon Moore, a black employee who was then President of Local 613, agreed that the interviews should be conducted prior to putting the Memorandum into effect.[10] Also, to assure that employees were encouraged to raise any questions they might have about the Memorandum, Mr. Moore was to accompany Mr. Giffen at the interviews. By letter dated February 26, 1969, Scott unilaterally informed the unions that the Memorandum would be deemed effective in March 1969. However, due to delays caused by Mr. Moore's illness and military obligations, it proved impossible to conduct the interviews until around the beginning of May 1969. At that time Mr. Moore and Mr. Giffen spent at least two weeks conducting individual interviews with virtually all of the 300 or so members of the affected class. As a result, the Memorandum did not become effective until May 16, 1969.

7. Among the provisions in the Memorandum was the so-called red circling provision (Paragraph C) whereby

[10] To put the Memorandum into effect prior to completing the interviews would in fact have been highly unfair. Those who had already been interviewed could have had an unfair advantage in competing for jobs over those who might also be interested in the same jobs, but who had not been interviewed, and thus might not be aware of the Memorandum or of their rights under it.

Scott essentially agreed to allow affected class members who transferred under the Memorandum to retain their former wage rate until they progressed to that rate in their new department, at which time they would begin receiving the wage rate applicable to their new job. In negotiating the Memorandum in the fall of 1968, Scott and the local unions agreed that, as in the case of the Jackson Memorandum, the red circling rate ceiling should be set at $3.00, i.e., that the retained rate of an affected class member whose wage rate was more than $3.00 at the time of transfer would be $3.00 even if his new job paid less than that amount. Plaintiffs' Exhibit 24 shows that in the case of 29 historically black jobs which affected class members might wish to transfer out of, 24 had rates of pay which were under $3.00. As to all affected class members in these jobs, therefore, transfer to any entry level job, including base rate jobs paying $2.701 per hour, in any other production line would not require them to take a reduction in wage rate. In three of the five jobs that were above $3.00, the affected class member transferring out of the job would only have to take a pay cut of between one cent and 7.7 cents per hour.

Effective June 1, 1969, wage rates at the mill all went up. As a result of the unforeseeable delay in implementing the Memorandum, the period of the red circling provision's maximum effectiveness did not last as long as Scott intended. Nevertheless, there were 16 postings for jobs in historically white lines of progression before June 1, but after the Memorandum's effective date. Counting only the affected class members still employed by Scott we were not at the time in historically white lines of progression, the average number who could have filled each of these jobs was 87. (See defendant Scott's Exhibit 7). Yet not a single affected class member took advantage of these 16 opportunities.

Even after the wage rates were increased in June 1969, the red circling rate remained of some use, for the wage

rates of five of the historically black jobs were not raised above $3.00. Six others were raised to rates less than six cents above the $3.00 rate.[11]

In short, from the evidence it is fair to say that although the provision placing a limit of $3.00 on the red circle rate may have deterred a few members of the affected class, it is doubtful that it had that effect on any who genuinely wished to transfer. Despite the large number of witnesses plaintiffs called, only one or two witnesses, such as Mr. John King, testified that they were deterred from transferring because of the failure of the red circle rate to protect his present pay scale. Even as to Mr. King, there is no evidence supporting plaintiffs' claim that he would have suffered an 80 cent-an-hour pay cut had he transferred to the Lab Helper B job in early 1970.[12] Furthermore, his case illustrates how all employees, when seeking to advance in a new line of progression, must be willing to take an initial pay cut in order to eventually earn larger salaries in more desirable jobs. Had Mr. King transferred to the Lab Helper B job in December 1969, the date of the first opening after implementation of the Memorandum, the seniority lists show that with department seniority dating from that date he would have risen by now, assuming that

[11] For instance, an affected class member in the Crew Leader job in Bulk Handling was earning $3.025 an hour after June 1, 1969. If he chose to transfer to the entry level job in the Beater Room, Fluff Dryer Utility, he would normally have had to take a 15.4 cent cut in hourly pay. Because of the red circling provision he would have had to take only a 2.5 cent per hour pay cut.

[12] Mr. King is a Starch Maker Helper. In February 1970, when he turned down the Lab Helper B job, it paid $2.871. The Starch Maker Helper job paid $3.170. Due to the red circling provision, Mr. King would have had to take at most a cut in pay of .17 cents an hour. Furthermore, after a two-week training period he would have advanced to the job of Lab Helper A, which paid $3.086, 8.4 cents, rather than eighty cents an hour less than he was receiving in his present job.

he was qualified, at least to the job of Special Projects Assistant in the Tissue side of the line.[13] The current pay for that job is $4.555 an hour. Mr. King's present job, Starch Maker Helper, pays $4.040 an hour.

8. Paragraph B of the Memorandum stated that "qualification requirements for transfer to any line of progression . . . will be no higher for any employee than for employees working in the line who were hired at approximately the same time." Scott conferred with OFCC officials about the meaning of this provision. It was obvious that such provision required some relaxation of Scott's general high school requirement and equally obvious that Scott could not abandon all educational requirements and incur the risk that older employees with little or no schooling would use their substantial mill seniority to move into demanding positions for which they could not reasonably expect to qualify without extremely long training periods, if then. On the advice of OFCC, Scott interpreted the provision to mean that an affected class member transferring into a formerly all-white line had to have at least as much formal education as the least educated employee already in the line hired at about the same time. Mr. Leon Moore, Vice President of Local 613, testified that Scott explained its interpretation of the Memorandum during a public meeting held with the unions in the Municipal Auditorium for purposes of bargaining over the terms of the Memorandum and that the relaxation of education requirements was one of the "main issues" discussed.

The OFCC has never subsequently informed Scott that its interpretation of the Memorandum is incorrect.

[13] It may be noted that the employees who did transfer to the Lab Helper B job in early 1970 have mill seniority dates approximately equal to Mr. King's, suggesting that their hourly rates before transfer were about the same as Mr. King's—and of course those employees—who were not affected class members, —did not have any red circling benefit.

Scott officials testified that in a few instances the unique safety concerns, or the vital importance to the company that the job be done accurately, required Scott to impose a high school education even if an employee presently in the line might have less than a high school education. The Chemical Recovery line is just such a case. Employees in that line must be able to monitor a complex control panel in order to prevent explosive situations from developing in the boilers. Failure of the workers to do their job properly would put all of the employees in the entire plant in extreme danger.

Studies by the Black Liquor Recovery Committee, an industry task force concerned with the safe operation of boilers, recommended taking steps, (such as insisting on a high school education) to assure that only well-trained, qualified workers are entrusted with responsibility for that operation.

The Bleach Plant and P&C Technical Control lines of progression also require high school education for both require workers to employ laboratory techniques in their jobs. Employees in the top job in the Technical Control line, for instance, must be able to prepare all the chemicals needed for the laboratory's operations. While a high school diploma does not assure that a person can be adequately trained to perform all the jobs in the line, it increases tremendously the odds that he could be so trained.[14]

Another such job is that of Scaler. In their jobs, Scalers are responsible for weighing the wood purchased by Scott when it is first brought to the mill. Information thus se-

[14] This seems especially so in light of the great expense involved in developing—and validating—tests that could perhaps more precisely screen applicants for these jobs. Where there are only occasional vacancies, the simplicity of a high school requirement seems all the more justifiable. Also, it is observed by the Court that the product of high school education today is more nearly the equivalent of grade school education of an age not long past.

cured goes to the Controller's Office, which in turn is responsible for paying for the wood. Scott expends some $21 million annually for wood on the basis of the tickets submitted by the Scalers. No one in the Controller's Office checks, or could check, the accuracy of these tickets.

9. All employees hired in 1963, or after, had to have an actual degree from a high school. White employees hired prior to 1963, but after 1958, could satisfy the high school requirement by obtaining an equivalent certificate. Scott has continued to accept such equivalent certificates for purposes of transfer, in the case of pre-1963 hires. Scott recognizes the GED program as providing the equivalent of a high school diploma, and as the testimony of Mr. Earl Williams and other witnesses for the plaintiffs showed, employees are in fact able to satisfy the requirement by obtaining a GED.

10. Since all employees hired in 1963 and after had to have a high school or a GED certificate to be employed or transferred, both black and white employees are treated equally (in the educational requirement) and no relief is due this segment of the affected class.

Prior to 1958, there existed no known educational requirement for any new hires. The Memorandum afforded the affected class member employed before 1958 adequate relief by providing (as far as the educational requirement is concerned) that he would only have to have achieved the educational level of the least educated white employee who was employed prior to 1958, and was then working in the line of progression to which such employee sought to transfer.

The problem arises as a result of those employees hired between 1958 and 1963. White employees were required to have a high school or GED equivalent; while no educational requirement was placed on black job applicants. Thus, white employees hired during this five (5) year period are permitted to advance while black employees who

had not achieved the required educational level remained dormant. This, of course, cannot stand. Relief in this area will be spelled out in the judgment portion of this Order.

11. The Memorandum provided that the affected class was to be interviewed, their opportunities for transfer and future advancement explained, and their desire for transfer determined. It went on to require:

> "They will automatically be considered for such transfer unless, after full explanation of their opportunity to transfer and future advancement, they elect not to be so considered and sign a waiver to that effect. This waiver can be revoked at any time at the written request of the employee."

Such automatic consideration would relieve affected class members of the minimal burden of signing up for entry level job vacancies, which are posted plant-wide. During about the first two weeks of May 1969 Scott, with Mr. Moore, a union official who also was a member of the affected class, conducted interviews, either individually or in small groups, with all but 27 members of the affected class. (Scott was unable to arrange a meeting with these 27 employees.) The employees interviewed were told their rights under the Memorandum including relaxation of the requirements for transfer into formerly white lines of progression; use of mill seniority when competing for advancement in those lines; the red circle provisions, and their right to be considered automatically for vacancies in other lines of progression. At the time 193 members of the class signed a statement declaring that:

> "I have had explained to me and understand recent changes agreed to between the Company and the Unions which may provide me with opportunities, not provided by the basic Labor Agreement, for transfer to other jobs and future advancement in lines of progression."

Plaintiffs complain that the affected class members did not really understand what the Memorandum was all about and what their rights under it were. The Court does not agree with plaintiffs' contention on this point.

First, there is the undeniable fact that at the time of those interviews, 193 members of the affected class, or ⅔rds of the employees interviewed, signed a statement in the presence of Mr. Giffen and Mr. Moore that they understood the Memorandum and their rights. Thus, it is far more probable that the affected class members generally understood the situation.

Second, the presence of Mr. Moore at these interviews was designed as a protection for the employees against the possibility that management might not do its job. Mr. Moore testified that he really did not understand portions of the Memorandum either, but the Court has great difficulty accepting this testimony.[15] Mr. Moore was President of the black local during the relevant period. The Memorandum was well known in the Southern paper industry and to Government officials charged with protecting the rights of black employees. The actual terms of the Memorandum were agreed to as early as November 1968. In view of this, and in view of the obvious importance of this document to the rights of the black employees who had elected him as their leader, the Court finds it impossible to believe that Mr. Moore was not fully knowledgeable about the

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[15] Contrary to plaintiffs' contention, Mr. Moore testified that he understood that to be automatically considered for a job the employee had to list the job on the interview sheet. Mr. Moore did originally indicate that it was his own personal intention to be automatically considered for the Mechanical Equipment Operator job, but he failed to list that job on his interview sheet (Plaintiffs' Exhibit 40), and he subsequently testified that he felt he had been unfairly denied the job only because he thought he had signed the actual job posting for that particular vacancy. Subsequent evidence showed that, contrary to Mr. Moore's testimony, he had not signed up for the vacancy in question. (Defendant Scott's Exhibit 9).

Memarandum by April 1969. The Court simply will not find that this individual sat through some 250 or so explanations of the Memorandum, found them universally inadequate, and never said a word about it until he testified at trial in January 1973.

Third, these same witnesses who testified that the Memorandum was not explained to them also testified on cross-examination of their falsification of their job applications. The justification for this dishonesty was as repetitious as a stuck record. There is no doubt the affected class knew of the Memorandum and had it fully explained to them.

Plaintiffs also make a specific complaint about the so-called "automatic consideration" concept in the Memorandum. (The affected class does not even want to bid on a job as it is posted. They want Scott to contact every member of the affected class each time a vacancy occurs to ascertain if they desire this vacancy.) Here Scott was faced with an enormous practical problem. The record shows that on the average there is a new posting for a job vacancy approximately every day of the week except Saturdays and Sundays. It is shown not to be uncommon for 20 or 30 employees to sign up for a job posting, and in some cases many more. It was demonstrated that after a posting is closed, the Personnel Department examines the sign-up sheets and initially selects the half-dozen or so employees with the greatest mill seniority. The records on these employees are then checked to determine whether they meet educational or other requirements of the job, and whether they are disqualified from transferring for one reason or another (such as having made a transfer within the past 12 months). When done, the job is offered to the most senior employee who survives this initial series of determinations. Typically, that employee visits the new job, in an effort to learn more about the working conditions and about the job itself. It was shown that not infrequently, after this or even after working on the job for a few days, the employee will refuse the job, and

in this case, the Personnel Department must contact the next senior man and the process begins anew. Thus, a great deal of time, not only of the Personnel Department, but also of supervisors and other employees, is occupied with the task of filling job vacancies. If the Memorandum was taken to mean that every affected class member must be automatically considered for every job vacancy, save only those he specifically waives, the time and effort Scott would have to devote to the task of filling new job vacancies would be staggering and an absolute absurdity. Thus Scott adopted an approach which the Court expressly finds is reasonable and lawful.

F. *The Memorandum of Understanding: Merger and Job Skipping Provisions.* 1. Section G of the Memorandum importuned Scott and local union officials, with the participation and approval of the International Unions, to negotiate the possibility of merging and shortening lines of progression, job skipping, and advanced level entry.

2. Following adoption of the Memorandum Mr. Giffen asked local union officers, including officers of Local 613, if they had any proposals for mergers. Similarly, Mr. Giffen raised the questions of advanced level entry and job-skipping, but received no indication from them that they wished to negotiate. This was so despite the fact that, as plaintiff Watkins testified, Scott had previously proven its good faith in this area by agreeing in 1968 to consider Local 613's request that all Local 613 jobs be placed in other lines of progression.

3. Despite Scott's inability to get the local unions interested in negotiations in 1969, it was able to negotiate changes in several lines two years later as part of the negotiations of the 1971 collective bargaining agreement, the first negotiated after the Memorandum.

In a merger proposed by the company, the historically black dead-end jobs of Chemical Warehouse Lead Man (formerly known as Crew Leader), Materials Handler, Supply Services Man, and Laborer in the same line with

the four historically white jobs in the Bulk Handling and Switching line, also in the P&C Traffic Division. The merger permitted employees in the historically black jobs to advance automatically, without transferring, in accordance with the terms of the collective bargaining agreement, to the higher-paid jobs in the historically white line. There are now 5 affected class members in the formerly all-white jobs.

Also as a result of the 1971 negotiations, the historically black jobs of Laborer, Track Worker, and Track Man in the Yard Maintenance Department were placed in the same line of progression with the four jobs of Mechanical Equipment Operator, Truck Driver-Dempster-Dumpster, Truck Driver-Boom Truck, and Truck Driver-Inside. These jobs were viewed as historically white jobs in the department, although three of the eight people filling the job are affected class members. Henceforth, employees in the historically black job of Laborer have the option of either advancing to the three historically white truck driver jobs and the Mechanical Equipment Operator job, or advancing to the jobs of Track Worker and Track Man. The Track Man job pays more than any of the historically white truck driver jobs or the Mechanical Equipment Operator job.

Finally, the separate Outside Truck Driver job in the P&C Traffic Department was restructured so that instead of permitting any employee to fill the job through transfer, it was agreed that openings in the job would be filled by the most senior Laborer in the Department.

4. Plaintiffs claimed, but failed to show, how Scott's present structure of jobs and lines of progression discriminates against black employees. All assignments to all the jobs which plaintiffs contend should be restructured are presently made on a non-discriminatory basis. Although plaintiffs contended in the Pre-Trial Order's list of disputed facts that blacks did not have an equal opportunity to train for higher jobs in the line, the evidence failed to

show that this was in any way true. Scott further introduced evidence showing the reasonableness and business necessity for the present job classifications. Concerning the specific jobs which plaintiffs contend should be restructured the Court makes the following findings:

(a) *Woodyard.* Both the historically white Woodyard No. 1 and the historically black Woodyard No. 2 are now fully integrated lines of progression. Thirty percent of the employees in Woodyard No. 1 are black, while 20 percent of the employees in Woodyard No. 2 are white. The evidence was that the two lines perform different types of work, although the role of the two lines in the entire paper making process are related since they both are concerned with preparing wood for the Pulp Mill. Mr. Peyer, Manager of the Pulp Mill, testified that the jobs in Woodyard No. 1 are more mechanically oriented than jobs in Woodyard No. 2, which are more likely to be basically manual labor jobs. Employees in No. 1 must make increasingly important decisions about the quality of the wood and chips, which employees in No. 2 need not make.

Both Mr. Peyer and Mr. Giffen testified that, nevertheless, if a suitable means could have been found to merge the two Woodyard lines, Scott would have been willing to do so. Both men testified that they discussed with appropriate union officials possible means of merging the two lines, but that the unions have never come up with a concrete plan for merging the lines. Local 613 did not make such a proposal either in 1968 (Plaintiffs' Exhibit 14) or after the Memorandum of Understanding. (See *supra* Finding F-2).[16]

Mr. Peyer testified that it would be impossible to simply merge the two lines and place each employee in a job according to his mill seniority. If this were done, the operation of the Woodyard would severely suffer for six months

[16] Even at the time of the trial, Mr. Watkins, a long-time employee in the Woodyard and a former official of Local 613, offered no concrete proposal for merger of the lines. Rather, he advocated leaving it to the government to work out.

to a year while each employee received the training necessary for the job. Furthermore, the resulting line would contain 18 jobs, which would make it by far the longest line at the plant; Mr. Giffen testified that Scott has sought to keep its lines shorter than the lines in other paper mills. (The Jackson Memorandum specifically indicates the desirability of keeping lines of progression short.) Scott officials testified that if the two lines were simply merged the resulting length of the line would create constant confusion as employes were temporarily promoted all up the line in response to the need to fill empty jobs in accordance with the terms of the collective bargaining agreement. This would make it very difficult to assure people had adequate training on all the jobs in the line before working in other jobs higher in the line, and it would also create endless administrative difficulties.[17]

Employees are now assigned to work in the Woodyard on a nondiscriminatory basis, and all black employees in Woodyard No. 2 hired since 1963 are free to and able to transfer to Woodyard No. 1. Out of the 61 black employees in Woodyard No. 2 only 27 were hired prior to 1958. The record does not disclose how many of these employees have less than a 9th grade education, the requirement for transferring to Woodyard No. 1, or how many of the 8 employees hired between 1958 and 1962 have high school.

(b) *P&C Beater Room.* The testimony of Scott's witnesses describing the development of the Starch Maker job demonstrated that Scott's failure to place the job in a line of progression has been caused by business necessity rather than any intent to discriminate. For many years, the all-black Starch Maker job was a hot, sticky, unpleasant job performed around starch cooking vats in the basement of one of the buildings at Scott. Through a manual process,

[17] To cover just one vacancy as many as 22 employees would have to move to new jobs and change their work schedules from one shift to another.

the Starch Maker supplied starch to all of the paper machines. The job was not related to any other job and was not in a line of progression. Around 1960, Scott started up No. 9 paper machine and installed a new kind of automated starch making process for that machine alone. It was situated on the other side of the building from the original Starch Maker job. Because the process was very complex and technical, the job was originally manned by employees from the Technical Control line of progression with supervision provided by college graduates with degrees in chemistry. Subsequently, in 1962, the No. 9 starch job was denominated a Chemical Additive job and integrated into the Beater Room line of progression, since most of the other jobs in the Beater Room line were physically located near the Chemical Additive job. The job paid 1/10th of a cent less than the Starch Maker's job. In 1967 the Chemical Additive job was divided into the Chemical Wet End and Chemical Dry End job, each filled by one man. The Chemical Additive Dry End Man was in charge of starch making (still only on No. 9) and the Wet End Man in charge of color addition. In 1968 a second Chemical Additive Wet End Man was added. In 1969 the company installed a new jet cooker starch making and distribution system to supply all of its paper machines, including No. 9. The new process involves a large amount of sophisticated machinery operated from a control room. Mr. Hanson, who has a B. S. in chemistry, and had previously headed the mill's Technical Section, testified that he was given a special assignment and spent the summer of 1969 coordinating this new starch making operation. The new starch making process replaced the former starch making operation for all paper machines. The incumbents in the old Starch Maker job were given first crack at the new job (all took it) and received three months of training for their new job. They were also given a 35-cent raise when they assumed their new job (over and above any other general increase they were entitled to under the collective bargaining agree-

ment). At the same time the Chemical Additive Dry End job was eliminated and the employees in the line were given the option of working as Starch Maker Helpers under the Starch Makers or of taking a pay cut and moving back down the Beater Room line: when they declined the opportunity, employees in the Cleaner jobs (who were black) were promoted to fill the Helper vacancies. It is the fact that these moves were motivated entirely by sound business reasons and not by racial discrimination.

Plaintiffs' proposal that the Starch Makers should be merged in the Beater Room line of progression just under the Stock Distribution job won't do. Mr. Bell, Superintendent of the P&C Mill, testified that he attempted, in 1969, to place the Starch Makers in a line of progression but no logical place for them could be found. The Beater Room is not the logical place, since the Starch Maker operation is totally separate, physically, from any of the jobs in the Beater Room and is not functionally related to them. Since Starch Makers, therefore, have no occasion to be at the end of the mill in which the Beater Room jobs are located it would be very difficult for those in jobs below Starch Maker to receive Starch Maker training and for Starch Makers to receive the necessary training in jobs higher in the line of progression. Filling temporary vacancies would be a nightmare. It may be noted that there are currently two affected class members working as First Helper in the Beater Room, the third highest job in the line; yet neither one appeared as a witness for plaintiffs to attest the possibility of filling the Stock Distribution Man job with employees who had not first been trained on the lower jobs in the line of progression.

In light of the fact that there are only 4 Starch Makers and 4 Starch Maker Helpers, and the further fact that Starch Makers earn $4.465, more than that earned by employees in half of the jobs in the Beater Room line of progression, merger of these jobs into the Beater Room line is plainly not workable.

(c) *Stores.* For many years the entry level job in the Stores Department has been Stores Clerk, which requires typing ability. Three employees, all affected class members, are presently employed in the Materials Handler job in that department. The jobs are not in the line of progression. The Stores Department is responsible for making $2 million a year in purchases. (The head of the department, Mr. Robert Sanford, did testify that the only job in the line requiring typing was that of Stores Clerk). There was no proof that this requirement, which is obviously reasonable, has a racially discriminatory impact.

Mr. Sanford also testified that the present incumbent in the Stores Clerk job had indicated a desire not to advance to higher jobs in the line. Therefore, when vacancies occur in the next higher job (Shift Stockman) they will have to be filled by posting the job and permitting employees to transfer from elsewhere in the plant. There was no evidence that the typing requirement would be imposed. Mr. Sanford also emphasized the difficulties of the jobs in the line above the Stores Clerk, stating that a person must be able to learn quickly the maintenance terminology in order to fill the Shift Stockman job. He noted that those working as Materials Handlers were not prepared by their job to fill these positions. He thus concluded that some screening device was necessary to assure that those selected for the Shift Stockman job were qualified. The requirement that those transferring to the Stores Department have either high school or GED (or 11th grade in the case of pre-58 hires) provides such a screening device. (Plaintiffs' Exhibit 9). No change is to be made in this line of progression. Any affected class member, including employees in the Materials Handler jobs, who have the necessary qualifications can apply when vacancies occur, and, if he has the mill seniority, expect to receive the next Shift Stockman job available. Mr. Sanford, in fact, said the Materials Handler who does have sufficient education, Mr. D. L. Sims, has the potential of becoming a good Shift Stockman. With

twelve years mill seniority he would probably have no difficulty qualifying for the transfer.

(d) *Dead-End Jobs.* Plaintiffs introduced no evidence that the way in which Scott fills dead-end jobs discriminates against blacks.[18] Thus the dead-end jobs that remain at the plant do not need to be eliminated in order to assure in the future that the jobs will lose their old racial identity. While company officials testified that Scott does not like to "dead-end" jobs, and avoids doing so whenever possible, it is also true that the operation of such an industrial complex as the Scott plant cannot be so neatly divided up so as to place every single job along with related jobs in a line of progression.

Defendant concedes that at the present time a significant number of those working in the dead-end jobs are affected class members, but plaintiffs failed to show that it was necessary to merge all these jobs into lines of progression in order to provide these employees with opportunities to enter lines of progression. In fact, the testimony suggested that many of the affected class members have elected to remain in these dead-end jobs, or have actually transferred to these jobs since 1969, because they prefer, for personal reasons, to work "day" jobs only. (If the jobs were merged into lines of progression the employees would, of course, be required to perform shift work). Defendant Scott's Exhibit 7 and 8 show that employees in such dead-end jobs have had, and will continue to have, innumerable opportunities to transfer to historically white lines of progression should they so wish.

G. *The Memorandum of Understanding: "Blocking"* 1. After adoption of the Memorandum the question arose whether affected class members should be permitted to

[18] Vacancies in such jobs are posted and filled by the most mill senior employee who applies, just as in the case of any other job. If no present employee wishes the job, Scott fills the job on a nondiscriminatory basis by hiring a new employee.

by-pass other affected class members who had less mill seniority but who had been in the line of progression longer. The question first arose in the Tissue Mill where one affected class member, Mr. J. B. Collier, was motivated to raise the problem by the rapid rise in the line of progression of Mr. Will Robinson, another affected class member. Mr. Collier was told that Mr. Robinson would not be able to by-pass him if and when Mr. Robinson achieved his level and was in a position to compete against him for promotions. The first time the question arose as an immediate problem was in the P&C Traffic Division. Mr. Furer testified that when the question was raised he discussed it at some length with the Personnel Department. After considering all the alternatives it was concluded that it would be more equitable not to permit affected class members who were junior in the line to by-pass less-mill-senior affected class members who had been in the line a greater length of time. This interpretation, dubbed by the plaintiffs as "blocking" was an entirely reasonable reading of Paragraphs A and E of the original Memorandum. (Plaintiffs' Exhibit 5). These sections provide:

> "(A) Mill seniority rather than job or department seniority will be the basis for permanent advancement of qualified employees determined to be members of the 'affected class', when in competition with employees not members of the affected class."
>
> "(E) Contract seniority will continue to be applied in all transfer and promotion situations except where 'affected class' employees are competing with one or more employees who are not members of the 'affected class' in which case mill seniority dates will be used for all competing employees."

In addition to being a reasonable interpretation of the applicable provision, Mr. Giffen testified that the com-

pany's interpretation was also favored because it rewarded people who had the initiative to transfer before other affected class members with more mill seniority did so.

Although Scott's interpretation of the Memorandum was brought to the attention of the OFCC, that Government agency has never indicated to Scott that it felt it was acting in violation of the Memorandum. When OFCC required Scott to amend Paragraph A, cited above, in November 1970 so as to apply the provision regarding mill seniority to temporary as well as permanent promotions, it gave no indication to Scott that the provision should also be reworded to change Scott's interpretation of the so-called "blocking" problem.[19]

2. The precise manner in which Scott applies Sections A and E is as follows:

In a case where two or more affected class members compete with non-members, the Memorandum of Understanding requires a three-step procedure. First, affected class members are compared to one another on the basis of contract seniority. Second, the non-members are also compared with one another on the basis of contract seniority. Third, the two surviving employees are compared on the basis of mill seniority, with the more senior man winning the competition.

A review of the current seniority lists demonstates the very limited importance of this entire issue of "blocking". There are only 11 affected class members now in a line

[19] At that time Paragraph A was changed to read:

"Mill seniority rather than job or department seniority will continue to be the basis for permanent transfer of qualified employees. Mill seniority will also be the basis for temporary or permanent promotion or demotion within a line of progression for qualified employees determined to be members of the 'affected class' when in competition with employees not members of the affected class."

of progression who have accepted all promotions available to them, but who are nevertheless "blocked" from promotions to higher jobs in the line of progression by another affected class member with more department seniority, but less mill seniority. In only 5 of these 11 occasions was the "blocked" affected class member prevented by his education from transferring before the Memorandum; in other words, in the remaining cases the member simply seized an opportunity that was also available to the member who is now "blocked" (and who would have gotten the job if he had applied for it because of his greater mill seniority).

Mr. Giffen also demonstrated that the problem is limited in duration as well, for it is his testimony that an employee would no longer be treated as an affected class member once he reached his "rightful place," i.e., when his mill seniority date matches that of the other employees in the same job. Similarly, once an affected class member reaches the top job in the line of progression he will no longer be in a position to "block" anyone else's progress in the line, whether or not he is still considered as a ember of the affected class.

Scott acted entirely reasonably after 1963 when it permitted blacks who later became affected class members to transfer to historically white lines because they had high school educations. At the time, Scott of course had no way of anticipating that the Memorandum would one day be invented and that such transfers might affect a few others' rights. In other words, Scott's success in achieving the transfer of blacks to historically white jobs prior to 1969 is hardly evidence of any intent to "block" the later progress of other affected class members.

Plaintiffs have failed to demonstate that this so-called "blocking" problem even had the "debilitating effect" upon transfers that plaintiffs claim it had. Only one of the many affected class members who testified for plain-

tiffs stated that the pospect of being eventually "blocked" by other affected class members deterred his transfer. Mr. Blanchard Knight is the most senior affected class member in terms of mill seniority still working at Scott. In his job as Loader Operator he earns $4.180, more than anyone else in Woodyard No. 2. Thus his reluctance to transfer because his rise in the line might eventually have been slowed by other affected class members is no evidence that other less senior, and less well paid, affected class members were similarly motivated by this concern. According to his testimony Mr. Knight was not aware of the potential "blocking" problem until he had actually applied for the job in Woodyard No. 1 and transferred to it, despite the fact that as a worker in Woodyard No. 2 he must have been at least generally familiar with the personnel in the other Woodyard line. It is inherently unbelievable that other affected class members, not as familiar as Mr. Knight must have been with the lines of progression to which they wished to transfer, would know precisely the effect Scott's interpretation of the "blocking" problem might eventually have on their progress in such lines prior to applying and receiving the job. Yet plaintiffs contend that knowledge of the fact deterred affected class members from even applying for transfers. This proposition is rejected.

3. Should the mergers of any lines of progression be ordered, it is admittedly possible that additional members of the affected class may be "blocked". Plaintiffs claim, for example, that if the two Woodyard lines are merged, eight affected class members would "block" other affected class members, but five of these eight blacks transferred into Woodyard No. 1 after the Memorandum of Understanding eliminated the high school requirement for all transferees.[20] In doing so they sacrificed between four and

[20] Plaintiffs also alleged in their Finding that in addition to the high school requirements a few employees were barred from taking

seven years of mill seniority and perhaps had to take a cut in pay. It would be totally unfair now to permit other affected class members who hung back at a time when they could have transferred to now go around the affected class members who had the initiative to transfer at an earlier date.

II. Maintenance Jobs

A. *Opportunities for Transferring to Maintenance*

1. Prior to 1962 the Maintenance Department was one of those departments in which only whites had worked. It was one of the departments opened up to blacks as part of Scott's general affirmative action policy. As found above, one of the four black employees placed in formerly all-white departments by Scott to dramatize its new policy was Mr. Clifton McNeil, who was transferred to a Helper job in the Maintenance Department and who is now a full-fledged Journeyman. The evidence shows that presently there are approximately 450 Maintenance craft employees, including both Journeymen and Helpers. Six of these are black and one other black employee was in a Maintenance Helper position, but resigned from the company a few years ago. These blacks now work in many of the Maintenance craft classifications, including Brickmason, Carpenter, Pipefitter, Painter and Tissue Finishing Mechanic.

2. Maintenance and craft helper jobs are apparently much sought after. Whereas in the case of production job vacancies some 20 or 30 employees may sign the posting and thereby apply for a vacancy (in some cases only two or three, and on occasions none sign up), it is quite common for 100 or more to sign for posted vacanices in the

the test because of their age. The collective bargaining agreement prohibited all transfer by employees, whether white or black, after the employee turned 36. This requirement was eliminated in 1968.

Maintenance Department. (Defendant Scott's Exhibit 8). The procedure for selecting the person to fill the vacancy is essentially the same as that followed in filling production vacancies. The Personnel Department examines the sign-up sheet and makes an initial determination of the half-dozen or so who signed up who have the most mill seniority, possess the necessary high school education and are not disqualified for one reason or another. The chief difference is that the employee who survives this competition must then take a series of tests (prior to December 1970 there was a single test involved) on which he must achieve specified minimum scores. If he does, he is then offered the vacancy and decides whether or not to take it based upon his own evaluation of the job and the working conditions.

Scott had a study made of all Maintenance Department postings from the effective date of the Memorandum to September 1972, the date the study was completed. The results are reported in Scott's Exhibit 8. During that 40-month period there were only 45 postings for vacancies in the Maintenance Department.

In many cases the employee who filled the vacancy had as much as 7 or 8 or even 10 years mill seniority. Two of these vacancies were filled by members of the affected class, one with over 7 years mill seniority and the other with over 11 years. In every single one of the 45 instances there was at least one of the members of the affected class who had more mill seniority than the person who filled the vacancy and who met all other requirements (high school education, etc.). In about one-half of the cases there were 10 or more affected class members who, if they had applied for the job and achieved satisfactory scores on the test, would have filled the vacancy, and in two cases there were 50 such affected class members. (The average was 12.4). Of course it is true that there were many other employees, both black and white, who had more mill seniority

than the employee who filled the vacancy, but who would not have been eligible for the transfer, either because of a lack of high school education or some other disqualifying fact, or because they could not achieve satisfactory scores on the test. Thus, plaintiffs' Exhibit 26, which purports to list cases where a black employee lost the competition for a Maintenance vacancy to a white employee with less mill seniority, proves little that is relevant and will be dealt with in later findings.

3. The foregoing relates to the transfer of production employees into craft helper jobs in the Maintenance Department. (One of the requirements was a 36-year maximum age limitation, which was in effect until June 1, 1968). In several of the Maintenance craft classifications Scott does not utilize helpers and in others it has only a limited use for helpers. Accordingly, in a number of Maintenance craft classifications, vacancies that occur are filled by hiring journeymen, i.e., individuals who already hold credentials showing them to be qualified to perform the skilled job. In some other cases Scott has an immediate need for a journeyman and cannot promote a helper to fill the vacancy. In all these cases, Scott hires journeymen directly off the gate, although these cases are rare; since 1964 only 13 such individuals have been hired by Scott. The parties stipulated in their Pre-Trial Order that Scott does not discriminate against blacks in promoting workers already in the Maintenance Department to journeyman status.

B. *The High School Requirement*

1. In about 1958 Scott adopted the requirement that those wishing to transfer to Maintenance craft helper jobs have a high school education. This was only a few years after Scott first obtained the mill from Hollingsworth & Whitney, and about the same time that it began modernizing and expanding the plant by building the new tissue mill. The record is silent as to the criteria used for the selection of maintenance workers prior to this time. (None

of Scott's Industrial Relations officials were employed at the mill then, nor was Mr. Krause, Manager of the Maintenance Department). The requirement of a high school education was unaffected by the Memorandum of Understanding since that agreement (like the Crown Zellerback decree which fathered it) was explicitly limited to production lines of progression only. As Mr. Giffen pointed out in his testimony, there would have been little point in applying the Memorandum to maintenance jobs because promotion in such jobs is based on ability and length of time in the job and not on comparative seniority, as are promotions in Production jobs.

2. The record fails to show that the high school requirement for transfer to Maintenance has had an adverse impact on black employees.

Furthermore, Scott introduced extensive testimony showing the reasonableness and business necessity of imposing the high school requirement on those seeking to transfer to Maintenance.[21]

In those crafts in which helpers are used, new employees are classed as Helper D, a job that pays the base rate, i. e., the lowest hourly rate in the mill. After 6 months the employee is automatically promoted to Helper C (with an 18¢ pay raise) and then in succeeding automatic steps totalling 2 years to Helper A. There he remains for up to four more years, since craft employees are promoted to the lowest journeyman grade (grade C) only when there is a vacancy. If there is no vacancy within four years, the Helper A is given a pay raise, denominated a Finished Apprentice, and

[21] Also, the Court takes judicial notice of the settlement recently entered into between the United States and construction craft unions in the Mobile area in which the high school requirement continues to be accepted as a valid prerequisite for new apprentices entering the apprenticeship program of those unions. Chief Judge Virgil Pittman approved these settlements in Civil Action No. 7206-72-P.

held there until there is a journeyman vacancy. In any event, a Helper A or a Finished Apprentice is not given a promotion, even if there is a vacancy, unless the company is satisfied that he is qualified.

C. *The Test Requirement*

1. The record does not show exactly what tests, if any, were utilized prior to 1958; however, Scott in 1958 began to utilize the Kopas test to screen not only new-hire applicants but also applicants for transfer into Maintenance Craft Helper jobs. At this time a production employee normally needed about 6 years of mill seniority to win the seniority competition for transfer into Maintenance. Thus, the new test requirement initially applied, on the average, to white employees hired into production jobs in about 1952. Initially, no rigid cutoff scores were used. However, upon the formal opening of the Maintenance Department to blacks in 1962 or 1963, Scott began using cut off scores so as to avoid any possible racial bias, however inadvertent, that could stem from the use of less objective criteria.

2. On July 1, 1968, Scott switched to the Wonderlic test. This was on the recommendation of OFCC. That agency had complained about the lack of validation study on Kopas, and Wonderlic was recommended because it had been validated—among other places, at the International Paper Company's pulp and paper mill right next door to Scott's mill in Mobile. Scott utilized one cutoff score for new hires and a higher cutoff for applicants for Maintenance Craft Helper jobs.

3. The record contains no evidence indicating that either Kopas or Wonderlic contains any bias against blacks. Moreover, it would be surprising if OFCC had recommended use of a test (Wonderlic) that contained racial bias, and in any event even a test which has a discriminatory impact is permissible if it is job validated, as OFCC led Scott to believe Wonderlic was.

4. Plaintiffs' scattered evidence about how many black employees did or did not take Wonderlic and pass it does not prove that that test had any discriminatory impact. Plaintiffs were given access to all employment records, including test scores, on black employees, and their Exhibit 26, together with Scott's Exhibit 8, showed very few such employees actually having been disqualified by their scores on Wonderlic.

5. Scott did not rest upon OFCC's recommendation. Promptly after instituting Wonderlic, Scott retained the services of an independent expert, Dr. William E. Scott, Jr. (no relation), who spent nearly two years attempting to come up with a battery of tests that would be valid predicters of job success at Scott Paper Company. As a result of these efforts, Scott dropped Wonderlic in November 1970 and began utilizing a battery of three tests—Bennett Mechanical, Purdue Non-Language and Perceptual Speed —to screen applicants for Maintenance Craft Helper jobs (see Exhibits M, N and O to defendant Scott's Answers to Plaintiffs' Interrogatories). The same three tests, but with lower cutoff scores, are also utilized to screen applicants for Production jobs, and a fourth test (Closure Flexibility) is also used for that purpose.

Plaintiffs have wholly failed to show that these new tests have had a racially discriminatory impact. The evidence shows that of 66 white applicants, 24 have passed all three tests. This establishes a 36.3% "white passing rate". But the evidence also shows that only 7 blacks have taken these tests and that 2 have passed (including one tenacious and courageous employee who failed twice and passed on his third try). Plaintiffs' attempt to offer the resulting 28.6% as a "black passing rate"—and thus to show racial impact —is wide of the mark. On its face the difference is not so great as to show, without any evidence of actual cultural bias in the tests, a discriminatory impact. Moreover, the sample is so small as to render the percentage calculation meaningless: If only one more black had passed the test,

the apparent passing rate would jumy to 42.9%, *higher* than the white rate; this shows the treacherousness of the calculation plaintiffs propose. (Much the same is true of the meager evidence on the difference in average point scores of whites and blacks who have taken the tests).

6. In the interest of a complete record, the Court required Scott to go forward with their evidence on job validation. It must be emphasized that plaintiffs' failure to show discriminatory impact makes validation evidence unnecessary.

7. Scott called Dr. Scott as a witness to explain the validation study, the results of which are summarized in plaintiffs' Exhibit 33. Dr. Scott testified that Scott retained him to make whatever studies were necessary to determine what tests the company should use and how they should be used, consistent with sound practice. Dr. Scott was not retained to satisfy legal requirements, and at no time did he specifically point his work toward those requirements. Nevertheless, his work is properly judged on that basis.

Dr. Scott concluded, after extensive studies, that Scott could profitably use the tests he recommended—which Scott now does—because he found sufficient evidence of their validity, i. e., of their ability to discern the existence of those aptitudes which are needed for successful performance on the job. No contrary evidence was introduced.

The Court is impressed that Dr. Scott is a qualified, experienced industrial psychologist. He is a graduate of Indiana University and took his advanced degrees at Purdue. He has been on the faculty of the Indiana University Graduate School of Business since 1962 and has published widely. His qualifications for the Scott assignment are uniquely high, in that he has performed test validation studies for a number of different paper companies and is thus thoroughly familiar with the industry.

It is Dr. Scott's practice to destroy all test papers, scores, etc. after completion of the validation study. He considers

it important that incumbent employees who agree to participate in a testing program be assured that their test scores and supervisor ratings will in no way affect their position or future with the company, and indeed the management will not even be made aware of this data. Dr. Scott followed that sound practice in the Scott study, and there is not and cannot be any serious contention that such data is needed to verify the results of Dr. Scott's study. Other data used in the study has apparently been lost, as it could not be located.

In addition to plaintiffs' Exhibit 33, Dr. Scott also prepared a one-page abstract, attached as Exhibit R to Scott's answers to the plaintiffs' interrogatories, and a test manual, which is not in evidence. Also, he reported orally—and extensively—the progress and results of his study to the company from time to time. In fact, Scott assigned Mr. Holler, a college graduate who works in Personnel, to Dr. Scott as his full time assistant and liaison with the company from October 1968 to May 1969.[22]

8. Dr. Scott performed what is known as a "concurrent" validation. This essentially involves, to simplify, giving a test to a group of employees, recording their scores, obtaining supervisor ratings or evaluations of the employees' performance, and comparing the scores with the ratings to determine whether there is a relationship, i. e., whether high scores correlate with high ratings and low scores with low ratings. If so, the test may be argued to be a valid means of screening applicants for that job.

There are a great many tests, however, and it was shown that it is necessary to make a tentative initial judgment as to which tests to try out. To approach this problem with

[22] Mr. Holler had worked in a training program at the Mobile mill for over a year when in October 1968 he was transferred to corporate headquarters in Philadelphia to work with Dr. Scott. He actively participated in most of the gathering of data under Dr. Scott's overall supervision.

any degree of intelligence, it is first necessary to know what makes for success on the job, i. e., what aptitudes seem to be required for successful performance. We are then instructed that the psychologist draws upon his knowledge of what tests are available and what aptitudes they purport to measure to make the initial selection of tests that might be valid. Dr. Scott followed these procedures, as later Findings show.

Dr. Scott initiated validation studies at three different Scott mills: Chester, Pa., Detroit, Mich., and Mobile. The Chester study never really got started for reasons unrelated to Dr. Scott and his work. At Detroit, Dr. Scott tried 5 different tests:

Bennett Mechanical

Perceptual Speed

Closure Flexibility

Purdue Adaptability

Closure Speed

The last two did not prove out and were dropped. At Mobile, the first three were tried along with two others:

Purdue Non-Language

Minnesota Clerical

Upon completion of the studies, Dr. Scott utilized the chi-squared method of comparing the data (this will be described further *infra*) and recommended use of three of the tests—Bennett, Perceptual Speed, and Purdue Non-Language—for the screening of applicants for Maintenance Craft Helper jobs; these three, plus Closure Flexibility, were recommended for screening applicants for Production jobs. These recommendations were based upon Dr. Scott's conclusion that these tests were valid for the jobs in question.

Important to note, however, is that Dr. Scott recommended the use of low cutoff scores for new-hire decisions, i. e., that the tests be used in only a nominal fashion. This was recommended, he testified, to enable him to study further the evidence of validation and to refine or modify, if necessary, his judgments based upon the initial study.

This can best be understood after first defining a "predictive" validation study. Such a study involves giving a test to all applicants but hiring without any regard for the scores. Then, after the new employees have had the opportunity to reach the appropriate skill level, they can be evaluated and the valuations compared with the test scores. The obvious difference between this and a "concurrent" study is that in the latter case only those employees who are on the job at the time of the study—who have in a sense been pre-selected—can take the test. This leads to what is known as a "restriction in range" problem, which both sides' experts agreed would *reduce* any observed correlation, i. e., would *understate* the possible validity of the test.[23] The disadvantage of a "predictive" study, of course, is that the employer is not actually utilizing the test at all as a screening device and will not do so until after the follow-up data can be obtained and analyzed—and this can take several years.

Thus, what Scott did, upon Dr. Scott's recommendation, was to combine the two approaches, both for initial hiring and Maintenance. To determine initially what tests appeared to be valid predictors of good job performance a "concurrent" study was used. But low cutoff scores are employed and in due course the new data (test scores and performance ratings) will be examined and fresh validity

[23] "Restriction in range" means essentially that there is not a normal distribution of data because the incumbent employees probably do not include persons who would score very low on the test (if it has any validity).

conclusions reached.[24] In fact, Dr. Scott's testimony shows that the cutoff scores Scott uses for screening Maintenance applicants are the scores he recommended for initial hiring decisions, and even lower scores are used for initial hiring; the latter, he testified, are so low that they would eliminate only ten to twenty percent of applicants.

9. Plaintiffs attacked Dr. Scott's study through the testimony of Dr. Philip Ash, Professor of Psychology at the University of Illinois at Chicago Circle. Dr. Ash, like Dr. Scott, is an industrial psychologist. He received his doctorate at Penn State in 1949. Dr. Ash had virtually no experience with the pulp and paper industry, having been in a paper mill only once, some twenty years ago in Tyrone, Pennsylvania. Dr. Ash also testified that a major topic of his attention in recent years has been the polygraph, and he testified that he had done considerable work demonstrating the value of this device in predicting the likelihood that prospective employees would steal once they were hired. Dr. Ash also testified that he is a member of a committee that has been working on a revision of the American Psychological Association Standards for tests, although the revised draft is still being debated and has not yet been adopted. The Court accepts the qualifications of Dr. Ash as an expert in psychological testing.

As a general proposition, Dr. Ash, despite his criticisms of some aspects of Dr. Scott's work, expressly declined to opine that Dr. Scott's work was professionally unsound. Dr. Ash also declined to testify that the tests Scott uses, on Dr. Scott's recommendation, are not valid predictors of successful job performance in skilled papermaker and Maintenance jobs.

[24] To assist the company in giving the tests and accomplishing preliminary analysis, Dr. Scott gave a three-day training course in Indianapolis to personnel representatives from some 15 different Scott facilities, including the Mobile mill, in the Spring of 1970.

10. Dr. Ash, of course, did not testify about the legal adequacy of Dr. Scott's study or about the extent to which that study did or did not comply with guidelines published by such Federal agencies as EEOC or OFCC. Dr. Scott expressly testified that he was not specifically attempting to follow any particular set of legal guidelines, instead, he was following his own best professional judgment about how to proceed with the study and the resulting report to his client. Although plaintiffs' attack upon Dr. Scott's study is in part based upon alleged failures to comply with these various guidelines, the Court of Appeals reminds us that the guidelines are precisely that, guidelines, and not rigid legal requirements. Moreover, it is not at all clear from the record exactly what guidelines were published and available in 1968 and 1969, when Dr. Scott was conducting his study.

11. The first criticism leveled at Dr. Scott's study relates to the fact that he did not prepare written job analyses or job descriptions before choosing the tests to study.

On this point, the criticism is not well founded.

First, Dr. Scott is obviously very familiar with paper mill operations and with the work performed by papermakers and other key mill employees. He testified that when he began the study at the Chester, Pennsylvania, mill he spent "a week or so" there and "sort of lived in". During that time he closely observed the work the employees were performing, especially the skilled paper making and Maintenance employees, and asked questions and carefully noted the responses of the employees to the questions and to the job situation. He also visited other Scott mills and talked with employees there, and has conducted validation studies at several other paper companies.

Second, plaintiffs failed to show that the various more formal approaches to job analysis were superior to Dr. Scott's. For example, Dr. Ash testified about several of these formal approaches, which essentially involve handing

Supervisors enormously long questionnaires and check lists (one of them has 62 different items on it) and asking the Supervisors to indicate which aptitudes on the list are important in the job. The results are then apparently fed into a computer, which supposedly grinds out a job analysis. With all due respect to those experts who follow this approach (including Dr. Ash), the Court simply cannot find that this approach is plainly superior to Dr. Scott's. Dr. Ash himself testified that after following this approach on a validation study he is doing for Greyhound, he made no attempt to apply his own judgment or the results of his own observations to verify the accuracy of the computer-made list, despite the fact that he spent something like 48 hours observing bus mechanics perform on the job.

Third, as has been found above, Dr. Scott initially selected five tests to try out in Detroit, he discarded two of them and tried the other three plus two new ones at Mobile; and he wound up recommending two of the tests that were tried at both mills, and one test that was tried at Mobile, as the tests that were to be used to screen Maintenance applicants at Mobile. In other words, Dr. Scott showed beyond doubt that on the one hand his initial selection of tests to try out was fairly close to what he later concluded was a valid group and on the other hand that he was not at all afraid to abandon a test he had initially selected if the evidence did not justify using it.

In short, the Court is inclined to give Dr. Scott especially high marks with regard to this threshhold step of analyzing the jobs and making an initial selection of tests to study.

12. The next criticism leveled by plaintiffs, a relatively minor one, has to do with the fact that Scott did not coerce any of its employees to take the tests Dr. Scott was studying. This criticism, too, is wide of the mark. Plaintiffs indulge in a rather large speculation that the employees who did not volunteer to take the tests are older, high-performing employees who have relatively little formal education

and are not good test-takers. There is, of course, no evidence to support this assumption, and it may as likely be true that the employees who are not good test-takers are also not good performers on the job. (Indeed, there is considerable testimony in the record that the Scott mill has become increasingly more complex over the years, and it may well be that an employee with limited formal education who has been on the job for twenty years or so is not able to perform at a high level of success in dealing with the more modern, complex equipment). In any event, whether or not this criticism is valid it is difficult to know what an employee could do about it. Dr. Ash testified that employees could be given incentives to induce them to take the test; however, there is no contention that this would guarantee that all employees would take the test, and in any event, it appears from the record that Scott paid overtime to employees who took the test and thus did provide a financial incentive to participate.

13. A relatively unimportant part of Dr. Scott's work, for present purposes, was the presentation of four Expectancy Tables, which are appended to the Summary Report, Plaintiffs' Exhibit 33. Dr. Scott testified that these tables, which he prepared according to a standard technique in the profession, are simply designed to present in a graphic form the probability of success that is likely to follow from a particular test score. For example, Expectancy Table No. 1 shows that a person scoring between 8 and 26 on the Bennett Mechanical should have about 38 chances in 100 of being successful on the job, whereas a person scoring between 37 and 40 would have 50 chances out of 100 of being successful. The reason these tables are not of great importance is that, as already found, Dr. Scott recommended that the company use extremely low cutoff scores for hiring decisions and that the company instead used these scores for screening applicants for Maintenance and used still lower cutoff scores to make initial hiring decisions. Dr. Scott testified that using these latter scores

would screen out only about 10 to 20 percent of applicants. Whether the Expectancy Tables are perfectly accurate in predicting the likelihood of success by a person who is eliminated is therefore not a matter of any real moment. In any case, the criticisms of Dr. Ash regarding use of certain hypothesized success levels rather than others was never clearly explained and cannot be accepted as a valid criticism of Dr. Scott's work.

14. For the reasons stated in the preceding paragraph, it is also unnecessary to resolve the purported dispute over comparison of theoretical predictions of success with empirical data. In any case, Dr. Ash's testimony expressly fails to support plaintiffs' criticism of Dr. Scott's work in that Dr. Ash acknowledged that Dr. Scott testified about having made just such a comparison, assumed that Dr. Scott followed the recommended procedure, and concluded that his approach was therefore "sort of justified".

15. Dr. Scott used the "paired comparison" method of obtaining job success criterion ratings. This method essentially involves asking Supervisors to compare the performance of each employee who works under that Supervisor with the performance of each other employee who also does. The precise technique is to draw up a series of cards, each one comparing only two employees. These cards are then arranged in accordance with a standard formula and are given to the Supervisor, who is asked to go through them and make his comparisons fairly quickly. The information on the cards is then tabulated in accordance with standard procedures, and comparative ratings are thereby derived. Plaintiffs acknowledge, and Dr. Ash himself agreed, this method is professionally sound and widely used. Plaintiffs only apparent criticism on this point has to do with evaluating the consistency of the ratings, i. e., determining whether there are cases in which a Supervisor rates A better than B and B better than C but C better than A. But again plaintiffs' criticism seems to be not well founded, because on cross-examination by plaintiffs' coun-

sel Dr. Scott testified that ratings were checked to see if there were obvious inconsistencies and, if so, how many, and that interrater correlations were also computed according to standard procedures. Thus, Dr. Scott seems to have performed the very step Dr. Ash believed was important.

16. The technique Dr. Scott employed to compare test scores with Supervisor ratings is known as the chi-squared method. As shown by the worksheet form, in evidence as plaintiffs' Exhibit 76, this technique involves dividing the sample into four groups: (i) those who perform high and score high, (ii) those who perform high and score low, (iii) those who perform low and score high and (iv) those who perform and score low. Obviously, the more valid the test—i. e., the closer the relationship between what the test measures and what it takes to succeed on the job—the more employees will fall into the first and fourth of these four groups. A mathematical formula is used to compute chi-squared, which is then converted by another formula to phi, the correlation coefficient. If chi-squared or phi reaches a certain level for a certain sample size, validity is established.[25]

The chi-squared method, although at first glance complex, is in actuality a very simple technique. The question is whether it does the job. Dr. Scott of course thought it did, especially in view of the relatively small amount of data he had to work with. (Although a sample of 20 to 30 is considered adequate, there is an obvious preference for more data, and Dr. Scott's recommendation that the company continue to study the validity of these tests was in part based upon the fact that the sample of Maintenance employees at Mobile who participated in the program totaled only 74).

Dr. Ash testified, however, that in his opinion the Pearson production moment correlation method is more appro-

[25] The larger the sample the smaller the coefficient needs to be to justify the conclusion that validity is established.

priate. This method, vastly more complicated than the chi-squared method, attempts to preserve individual differences between scores and ratings rather than classifying all members of the sample into one of the four groups mentioned above. Dr. Ash repeatedly testified that the Pearson method was more "efficient" because it did not "throw away" these refinements. That may or may not be true (Dr. Scott did not agree with Dr. Ash on this point), but it is unnesessary to resolve that dispute because it is immaterial. First, Dr. Ash admitted that the chi-squared method is the preferred method when the quantity of data is not large, by which he meant something of the order of 20 to 50 cases, and 74 cases does not seem to be a great deal more data than 50. Second, Dr. Ash persistently refused to state that Dr. Scott's method was not professionally sound or acceptable, limiting his criticism to the comment that it was "inefficient". Finally, Dr. Ash offered no evidence whatsoever that using the more complicated Pearson method would ever produce a different result, i. e., would ever show that a test which appeared valid by use of the chi-squared method would be invalid if the Pearson method were used. Indeed, the chi-squared method is a means of approximating the very result that is computed more exactly by the Pearson method, and on cross-examination, Dr. Ash, in response to a specific question, testified that he was not aware of any study in which both the Pearson coefficient and the coefficient derived by the chi-squared method were both calculated and compared with one another.

In short, the net effect of the testimony on this point—which plaintiffs consider to be one of their most important criticisms of Dr. Scott's work—is that in industrial psychology, as in many other fields, there is more than one way to skin a cat and that one can always find an expert who can criticize in some detail or another the work product of another expert.

17. Plaintiffs also criticize Dr. Scott for using the so-called Yates correction in the course of converting the

calculated chi-squares into the phi coefficients which are the actual measure of the validity of the tests. This point was never explained. All Dr. Ash said was that the use of the Yates correction is not algebraically supportable. That may or may not be true. (Again Dr. Scott disagrees.) But it would appear from the worksheet, Plaintiffs' Exhibit 76, that the Yates correction always has the effect of reducing the observed correlation. In other words, if one did not employ the Yates correction, the phi coefficient one would derive would be higher than it would be if the Yates correction were employed. This means that using the Yates correction could lead to a decision to reject a test that would otherwise be valid but it could not lead to a decision to use a test that is not valid. Accordingly, and in view of the sparseness of the record on this point, this criticism of Dr. Scott's work is rejected.

18. Plaintiffs also challenge the combining of different Maintenance Craft jobs into a single sample. The 74 Craft employees who participated in the Mobile study consisted of Pipefitters, Electricians and Finishing Maintenance Mechanics. But contrary to plaintiffs' contention, Dr. Scott testified explicitly and at length about this practice. He said that not only his own direct experience, but also other studies in the paper industry demonstrated that these different crafts possessed very similar underlying aptitudes, making it quite appropriate to use a single test or group of tests to screen applicants. In fact, when asked by plaintiffs' counsel about *Stevenson* v. *International Paper Co.*, Dr. Scott pointed out that it was one of the cases in which the sub-samples of individual crafts were large enough to study separately and in which it was demonstrated that the validity of the test under study was the same for the sub-samples as for the combined group.[26] Accordingly, plaintiffs' criticism on this point is rejected.

[26] It may be noted that blacks have taken these tests for entry into Maintenance in the course of applying for four different

19. Plaintiffs complain that Dr. Scott also failed to determine whether these tests have validity for black employees or applicants separately. This involves the concept of "differential validity", which hypothesized that a test which is a valid predictor of successful performance for whites might not be for blacks, presumably because of some kind of cultural bias that is inherent (however inadvertently) in the test. This theory has been afoot in the psychological profession for a good while but has received its primary attention since about 1965 or 1966. Dr. Scott testified that there have been several extensive and well done studies that have looked into this problem, particularly one completed recently by the prestigious Educational Testing Service in conjunction with the U.S. Civil Service Commission under a Ford Foundation grant. Dr. Scott testified that these studies had all demonstrated that the hypothesis of differential validity is not supported—a view Dr. Scott has himself held for several years. (Dr. Ash did not testify about this point, and it may be inferred that his view of the issue would not have supported plaintiffs.) Nevertheless,

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Helper jobs: Pipefitter, Mechanic, Finishing Maintenance and Carpenter. Pipefitters and Finishing Maintenance men were in the actual sample of 74, the Mechanic job seems on its face closely related to these two, and of the two blacks who applied for the Carpenter job, one of them passed and is now a Carpenter Helper.

Also, three blacks took the test for the Knife Grinder job. Mr. Krause was asked (by the company's counsel) about the Knife Grinder job. He acknowledged that the skills and aptitudes needed for that job might not be the same as those needed for other Maintenance Craft jobs (although the Knife Grinder job is highly complex and demanding and had previously been handled by qualified Machinists). He testified that if he could find some other acceptable method of screening applicants for this job he would not insist on use of the regular Maintenance test battery. But he also testified that there are only four incumbents in the job (and no Helpers) and that as one might expect vacancies do not frequently occur. Therefore, whether the validity of the test battery is precisely as strong for this position as the other is not of much importance.

because the question had not been definitively resolved at the time of Dr. Scott's study for Scott Paper Company, and in the spirit of scientific inquiry, Dr. Scott attempted to secure validation data for a separate group of black employees. This proved impossible, however, because there are not enough skilled black Maintenance Craft employees or skilled black papermakers at Scott's mill in Mobile to form adequate sub-samples.[27] It was Dr. Scott's expectation that as data continue to be gathered there may at some future time be a sufficient change in this situation to permit study of a black sub-sample of skilled craft employees or skilled papermakers, and he maintains a sufficiently open mind about the differential validity hypothesis to be willing to examine such a sub-sample when that becomes possible. Accordingly, the objection to Dr. Scott's study based upon the differential validity hypothesis is rejected both because of the apparent invalidity of the hypothesis and because it was not technically feasible to study a black sub-sample.

20. A major point of attack upon Dr. Scott's work had to do with the content of his report to his client. Plaintiffs' position is that the report (meaning the summary in evi-

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[27] Dr. Scott is not subject to criticism for not administering the test to semi-skilled or unskilled employees. An employee hired at Scott's Mobile mill is not hired for any specific production job or department but rather to fill the company's immediate manpower needs, which as often as not are for entry level employees in the paper machine lines of progression. Thus every new employee is potentially a skilled papermarker within a few years after being first hired. Scott chooses not to hire some employees with the intention of never allowing them to progress into the skilled papermaker positions, and it can hardly be criticized for this policy. It follows that it is equally reasonable for Scott to be concerned, in its pre-employment testing, with finding out which applicants have the aptitudes necessary for the skilled papermaker jobs rather than for some semi-skilled job in another production department. Likewise, one who enters a Maintenance Craft line as a Helper expects to progress to the skilled level (Journeyman) within a few years.

dence as plaintiffs' Exhibit 33) fell short of the professional (and legal) standards. The Court declines to fault Dr. Scott on this issue.

The professional standards are said by plaintiffs to be included in the Standards for Educational and Psychological Tests and Manuals, the "red book," published by the American Psychological Association in 1966. (No copy was introduced in evidence, but Scott provided a copy to the Court.) This document does not, however, contain any standards governing reports of validation studies conducted by psychologists for individual clients; instead, it deals with reports by those who develop tests in the first instance. Thus the source of the alleged professional standards referred to by plaintiffs is unclear.[28]

Plaintiffs may be contending that the EEOC testing guidelines are the source of the *professional standards* Dr. Scott should have followed. One difficulty with this position is that those guidelines were published in the Federal Register on August 1, 1970 (35 F. R. 12333), whereas Dr. Scott performed his validation study in 1968-69 and prepared his Summary Report (Plaintiffs' Exhibit 33) in late 1969 or perhaps early 1970; it hardly seems appropriate to criticize Dr. Scott for not following standards that had not yet been published.[29]

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[28] The Court declines plaintiffs' invitation to rely, as a source for these standards, on the draft of a revision of the red book which Dr. Ash and a committee are working on. No copy is in evidence and the Court sustained Scott's objection to any questions about what the draft may or may not provide.

[29] It is true that EEOC had previously issued a set of testing guidelines in August 1966 (which the 1970 guidelines superseded), but they were never published in the Federal Register and no copy was offered in evidence. Scott has provided the Court with a copy, however, and the 1966 guidelines say nothing about the requirements for reporting the results of a validation study a psychologist has made for his client.

Apart from the matter of published guidelines, Dr. Ash testified that in his opinion a psychologist's report to a client should contain sufficient detail to permit another psychologist to replicate the first psychologist's study. Dr. Scott expressly disagreed with this viewpoint. The Court accepts Dr. Scott's position as the more reasonable. There is no compelling reason why the comprehensiveness of a professional adviser's report to his client may not properly be based upon the client's faith in the adviser's competence to do his job without another adviser checking up on his work. This is especially true here, where the company assigned its own employee to assist the adviser and where the adviser has maintained a continuing relationship with the client to this very day. Also, it is indicated in the record that some of the back-up material was preserved but simply could not be located during pretrial discovery and presumably has been lost or mislaid.

21-22. In most instances Dr. Scott's summary of his study states that the relationship between test scores and job performance "was significant at the .05 level", while in some other instances it is said that the relationship "approached significance". (Others, of course, were found not to be significant, and these tests were rejected.) Plaintiffs criticize Dr. Scott because the tests he recommended include both the first two types rather than only those in

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OFCC also has published guidelines, but those came out in 1971 (36 F. R. 19307); the prior version did come out in September 1968 (33 F. R. 14392) but all they said about such reports (Sec. 3) is that

> "(4) Presentations of the results of a validation study must include graphical and statistical representations of the relationships between the test and the criteria, permitting judgments of the test's utility in making predictions of future work behavior."

and it is not clear that Dr. Scott's report does not meet this standard.

which the relationship was found actually to be "significant". This criticism is not well founded.

It is first necessary to understand what "significant" means in the present context. A validation study begins with the null hypothesis, i.e., the hypothesis that there is no relationship between test scores and criterion ratings. To find a test valid is to find that there is sufficient data to make it likely that there is a positive relationship. The convention in the profession is to use the .05 level (5% level) of significance as the benchmark, which simply means that the chances are only 5 out of 100 that this relationship results from coincidence. But this is only a convention and not a rigid requirement. As Dr. Scott testified without contradiction the APA recognizes that if the relationship is significant at the .06 or .07 level i.e., that the chances are only 6 or 7 out of 100 that it results from coincidence—it *is* a significant relationship within the accepted professional meaning of that term.

Scott anticipated plaintiffs' criticism on this score and elicited from Dr. Scott direct testimony that in those cases where in his Summary Report he described a relationship as "approaching significance" he had in fact found significance at the .06 or .07 level and used the "approaching" terminology to signify that. Thus, if no more were involved, the Court would be justified in finding that Dr. Scott's recommendation that these tests be used was based upon a professionally acceptable validity conclusion.

But more is involved, which makes this finding even stronger. First, Dr. Scott testified that there was a restriction in range present, especially in the case of Maintenance Craft employees, which means that the actual correlation is likely to be stronger than what Dr. Scott was able to calculate.[30] Second, he also testified that he knew

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[30] As found above (Finding II C-8) Dr. Ash concurred in this view.

these tests had been found valid in predicting success in skilled Maintenance and papermaking jobs in numerous other paper mills. Third, as has already been found, Dr. Scott is conducting a continuing review of the impact of these tests and in fact had received more data just before he testified at trial.

Finally, Dr. Scott also relied in part upon the fact that every test he recommended for Maintenance actually achieved statistical significance (at the .05 level) for the combined sample of 128 skilled papermakers and Maintenance Craft workers at Mobile. This he considered important, he testified without contradiction, because there is considerable evidence that these two classes of employees share a number of fairly basic aptitudes. Plaintiffs specifically attack this practice but offer no evidence to support their objection, or in rebuttal to Dr. Scott's position.[31] The Court finds with Dr. Scott on this point.

23. In conclusion it should be emphasized that Dr. Scott, like other good scientists, has not closed his eyes to the possibility that more data could change the conclusions he reached in 1969, and the company has accepted his recommendation that while these tests be used they be continually studied. Obviously, using a test that seems from all the evidence to be valid is a sound practice, much to be preferred to using a test that a third party (albeit a Gov-

[31] Plaintiffs' objection in any event seems to rest upon a misunderstanding of the relationship between the validity of a test and the cutoff scores the company decides to use. If the basic aptitudes are, as Dr. Scott testified, common to both types of employees, the same test or group of tests can validly be used to predict success on both types of jobs. It is in no way inconsistent with this for the company to require higher cutoff scores for one job group than for the other. All that means is that the *level* of aptitudes required for the first group may be higher than for the second (even though the aptitudes are similar) or that the available supply of qualified applicants is higher for the first group than the second and the employer can afford to be choosier .

ernment agency) has said had been validated at some other mill. The other alternative—using no tests at all and simply signing up the first man in the door (or the most senior)—had nothing to recommend it and, in view of the responsibilities carried by a Maintenance Journeyman, has much to be said against it.

24. The Court thus concludes that the battery of tests Scott Paper Company currently is using is job validated and there exists a business necessity for such tests. However, because Scott did utilize tests prior to November, 1970 which were not validated, those affected class members who were disqualified as a result of those tests must be given an opportunity to take the current battery of tests.

III. Supervisor Jobs

1. Mr. Swider, Controller of the Mill, testified that a black worker under him is the Supervisor of Computer Operators, that another is in charge of key punch operators, and that there are a number of other blacks holding responsible positions in his department. Mr. Wikle, head of the P&C Consumers' Representative Department, testified that a number of blacks have worked in the CR jobs, including some who have since been promoted to responsible jobs in the Mobile plant or at other Scott plants throughout the country.[32]

A number of Scott witnesses, including Messrs. Giffen, Russo, Peyer, Speier, Panzram and Fuer testified as to the special requirements a person who seeks to be a first line supervisor must possess. First line supervisors work shifts and are responsible for directly supervising the

[32] The CR Department serves as the principal "breaking in" position for college graduates who are ultimately destined for personnel, sales or other "white collar" jobs in the company. Mr. Holler began his Scott career as a CR in Mobile.

work of the hourly employees. The qualities a supervisor must possess are leadership ability, skill in getting along with other workers, intimate knowledge and proven competence in the work hourly workers under his supervision must do, intelligence, initiative, and willingness to assume responsibility. According to plaintiffs' Exhibit 13 there are currently nine black first line supervisors.[33] In an effort to increase the number of black supervisors Scott even named one black, Mr. Earl Love, a supervisor in the Roll Wrapping and Shipping Department even though he had not worked as an hourly employee in that line. He is the only man without a college degree who has been made a supervisor in the Department without prior work experience in the area.

Three facts help explain why there are not as many black supervisors as Scott would like to have. One is that until recently there were comparatively few blacks who had risen sufficiently high in enough lines of progression to gain the experience and technical knowledge required of a supervisor. Second, Scott employs graduate engineers for many of its supervisory positions in the Maintenance and Technical Departments. Third, and the most realistic reason, is the low turnover rate among the supervisory positions.

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[33] The nine supervisors include two who actually supervise other salaried employees in the Controller's Office. Plaintiffs' Exhibit 13 also lists two additional black Consumer Representatives. Mr. Powe and Mr. Morrissette, who, under the CR program described by Mr. Wikle in his testimony, operate partially as shift supervisor. They can be expected to progress, under the program, to Consumer Representative Shift Managers in the near future. Defendants contest plaintiffs' apparent implication that because three of the supervisors are in charge of Cleaners jobs, they are "black jobs". The Cleaners jobs have white as well as black employees. In the case of Mr. Ray Dickinson, for example, who is Mill Services Supervisor for the Pulp Mill, Mr. Peyer testified that when he is absent, a white temporarily moves up to fill the position.

2. Selection of first line supervisors is done by the top management officials at Scott on the basis of the most objective criteria possible. The evidence failed to indicate that Scott's choice of supervisors was affected by any racial bias. Such objective criteria as attendance records, productivity records, and the number of reprimands received are used in selecting supervisors. The other criteria governing the choice of supervisors, such as leadership and intelligence, *are* objective criteria as these qualities are easily recognizable in employees whose work has been observed for a number of years. A person's potential as a supervisor is confirmed by temporary set-ups in which the employee is given a chance to see how well he can perform as a supervisor. Such try-outs provide management officials with a further, objective means of determining whether the employee is qualified to be a permanent first line supervisor.

The selection of supervisors is made primarily by the managers of the departments. In nearly all cases department heads are not former hourly employees, but professional engineers who have worked for Scott or other paper companies in a variety of locations for a large number of years. In all cases the choice is then cleared with the Personnel Department and with Mr. Gehlen, a Division Vice President of Scott and head of the Mobile Plant.

Plaintiffs failed to introduce any evidence suggesting that the first line supervisors had the authority to decide who would be first line supervisors and who would not be. To the contrary, the evidence actually showed that while the recommendation of other first line supervisors and other supervisors who work below the manager is considered, such employees do not have chief responsibility for the decision. Middle level department officials work closely with the hourly employees, and if a first line supervisor were influenced by racial bias in his recommendation for supervisors, such men would be able to counteract this bias.

3. A majority of first level production supervisor vacancies are filled from the upper ranks of incumbent hourly paid employees. A minority of maintenance supervisor vacancies are filled from the ranks of hourly maintenance employees; many are graduate engineers hired directly into the maintenance supervisor jobs. Those wishing to be considered for supervisory jobs are able to express their interest to the supervisors with whom they come in constant contact. Although this requires a certain degree of initiative, just such initiative is in itself one test of whether the employee has the potential to be a supervisor.

4. There are no formal education or testing requirements for advancement to supervisor, nor has the company rigidly followed a policy of selecting only those hourly paid employees who have advanced all the way through their respective lines of progression. By the time a person has gained sufficient experience to qualify as a supervisor management officials know the employee well enough from first-hand observation to make tests and the like unnecessary. Furthermore, as already stated, Scott uses temporary set-ups as a means to "test" a worker's ability to be a first line supervisor. Scott's decision not to apply arbitrary standards to the selection process makes it more possible that qualified employees will be selected; the person with the most seniority does not necessarily make the best supervisor.

IV. Will Robinson's Discharge

1. On March 10, 1972, Mr. Will R. Robinson was discharged from his employment at Scott. Plaintiffs and the class they represent admitted that defendant Scott does not discriminate against blacks in administration of its disciplinary policy, but in the specific case of Will R. Robinson, his discharge was racially motivated. The Court concludes it was not.

2. Mr. Robinson was originally hired by Scott in 1959. In 1965, he transferred to the paper machine line of progression in the Tissue Mill. He progressed through that line from 4th Hand Trainee to 4th Hand, to 3rd Hand, and to Back Tender in June 1969.[34]

From June 1969, until the time of his discharge, Mr. Robinson's regularly assigned shift supervisor was Mr. Thomas O. Clemens. Mr. Clemens testified that Mr. Robinson was an "adequate" Back Tender during the first two years he supervised him, even though he complained that Mr. Robinson never made any effort to learn the Machine Tender's Job. In the early part of 1971, there was a significant drop in the quality of Mr. Robinson's work and he was inattentive and showed little interest in his job.[35] After informal counseling had little effort, Mr. Clemens issued an oral reprimand in the presence of a union Shop Steward, Mr. McKensie,[36] as a specific result of Mr. Robinson's failure to make appropriate checks of the quality of paper which was later found to have had poor "slitting". Three sets of paper were adversely affected. Mr. Robinson was advised that "In the future, any case of poor workmanship will bring further action." (Defendant Scott's Exhibit 31).

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[34] Back Tender is the second highest job in the line of progression and one of the highest paying jobs in the mill. At the time of trial, three of the twenty Back Tenders in the Tissue Mill were black and members of the affected class.

[35] Mr. Robinson admitted that in March 1971, that he began to help his father-in-law operate a bar and Scott contended that this outside responsibility was the cause of the decrease in the quality of his work performance. It is unnecesary for the Court to make any findings in this regard.

[36] The collective bargaining agreement between Scott and the various unions requires that a union representative be present when oral reprimands are issued to hourly employees.

3. Following the issuance of the oral reprimand, Mr. Robinson displayed some improvements in attitude and work performance for a few days but soon thereafter began again to display a poor attitude and general lack of concern and responsibility for his work, such as frequent absences from his work station to use the telephone and failure to join in work with other members of the crew. Mr. Robinson refused to take proper responsibility or exert initiative expected from the Back Tender. All of these complaints are outlined in a report (Defendant Scott's Exhibit 42) by Mr. Clemens of the background of a written reprimand (Plaintiffs' Exhibit 60) which was issued on June 19, 1971, when Mr. Robinson's work performance had not shown improvement. Mr. Robinson was advised, by that reprimand, that his work performance and attitude "must improve or further action would be taken".

4. Shortly after the issuance of the written reprimand of June 19, 1971, the bargaining unit employees of Scott commenced an economic strike incident to the contract negotiations taking place during that year. The strike lasted 65 days. In September, shortly after the return to work following the strike, it was discovered that a paper sample taken off the #5 Paper Machine during Mr. Robinson's shift had been folded improperly so as to give the false appearance of proper tensile strength.[37] Mr. S. J. Lang, Mill Superintendent, testified that he had investigated the incident and found Mr. Robinson to be responsible.[38] On the basis of his investigation of the facts, Mr.

[37] Following the strike, Mr. Clemens was hospitalized and did not return to work until November, 1971. During this period, Mr. Robinson was working under Mr. Bertram Lawrence, a Move-Up Supervisor.

[38] The evidence indicated, and Mr. Robinson conceded, that the responsibility of this test is that of the Back Tender. Mr. Robinson attempted to avoid personal responsibility by claiming that the

Lang concluded that Mr. Robinson had improperly folded the sample and, accordingly, issued a written reprimand. The reprimand stated that "future instance of this type will result in loss of . . . job". (Plaintiffs' Exhibit 61).

5. A few weeks later, on November 12, 1971, Mr. Robinson was involved in another incident. It appeared that the #5 Paper Machine to which he was assigned had developed a number of operating problems. At one point, the 4th and 5th Hands were not following appropriate safety procedures and Mr. Robinson was directed by the Supervisor to correct the situation. Mr. Robinson told the Supervisor that "it wasn't his job to train employees and that it was the company's responsibility". Yet Mr. Robinson conceded on cross-examination that the Back Tender has responsibility for the "dry end of the paper machine" and the evidence established that the Back Tender is responsible for the safe operation of personnel working on the dry end of the machine. As a result of the incident, Mr. Robinson and the Supervisor became embroiled in a heated discussion which very nearly resulted in a fight.[39] Following standard practices after any confrontation between hourly and supervisory personnel, the company immediately sent the hourly employee, Mr. Robinson, home for the rest of the shift. Mr. Lang testified that any time a confrontation of this type takes place, the first step is to send the hourly employee home until responsibility can be established. Mr. Lang said that he investigated the incident and found that the confrontation had been precipitated by Mr. Robinson's insubordinate conduct to the

Division Manager, Mr. Baldwin, had told him to "get the paper passed". There is nothing in the record, however, to support a finding that this statement was a direction for Mr. Robinson to cheat on the sample.

[39] The plaintiffs' witness, Mr. Pettaway, testified that the Supervisor made a playful gesture and that Mr. Robinson responded by balling up his first and drawing it back to strike the Supervisor.

Supervisor, Mr. Lawrence. Accordingly, Mr. Robinson was issued a written reprimand, suspended for three days, and advised that "any future episode of this nature will result in your termination" (Plaintiffs' Exhibit 62).

6. Several weeks later, on November 23, 1971, several reels of paper came off the machine overweight. It was established that it is part of the Back Tender's responsibility, in this case Mr. Robinson's, to take appropriate steps to see that the weight of paper being produced on a paper machine is within specifications. As a result of this incident, an investigation was conducted and it was concluded that Mr. Robinson had failed to follow good operating procedures. He was orally reprimanded for the incident and again advised that "any future incidents of poor workmanship would result in disciplinary action" (Plaintiffs' exhibit 64).

7. In December 1971, Mr. Robinson testified that he was offered a temporary promotion to Machine Tender but refused on the claimed basis that he did not want to move up to these additional responsibilities and wanted to stay with a job which he was familiar. It is significant, however, that only a few weeks previous, he had not been given a temporary promotion to Machine Tender on account of clerical inadvertance, and following a complaint by him concerning the promotion, he was reimbursed for monetary earnings he would have received had he been promoted.

8. The incident giving rise to Mr. Robinson's eventual termination occurred on January 15, 1972. Mr. Clemens testified that early in the shift he discovered that Mr. Robinson had failed to take appropriate weight tests on paper being produced on the machine, the same type incident giving rise to the oral reprimand on November 23, 1971. Later on the same shift, Mr. Robinson discovered that he had failed to change the width of the paper following a brand change and, as a result, several cuts of paper

were lost. Five or six reels were involved and, as a result, the monetary loss to the company amounted to approximately $1,500.00. Following a full investigation and numerous meetings with union officials, Mr. Lang concluded that Mr. Robinson should be discharged. The matter of the discharge was immediately referred to the grievance procedures provided for in the collective bargaining contract between Scott and the various unions. Following further discussions with union officials, Scott decided to reduce Mr. Robinson's discharge to a 30-day disciplinary layoff, a reduction in job to 3rd Hand, the job below Back Tender, for 60 days, and a six-month probationary period and so notified the union and Mr. Robinson (Plaintiffs' Exhibit 63).

9. Mr. Lang notified Mr. Robinson that he should return to work on February 16, 1972, both by telephone and letter (Defendant Scott's Exhibit 32). When Mr. Robinson refused to return to work, numerous efforts were made by the Personnel Manager, Mr. Otterlei, and the Director of Industrial Relations, Mr. Giffen to explain to Mr. Robinson that his refusal to return to work would result in discharge. He was also reminded that he was free to proceed with appropriate remedies under the grievance process if he returned to work. Mr. Giffen advised Mr. Robinson that "there are sufficient avenues available for you to process whatever complaints you feel you have (with respect to the discipline imposed), but refusing to return to work is not one of them" (Defendant Scott's Exhibit 34). Thereafter, Mr. Robinson refused to return to work for some two weeks and, finally at Mr. Robinson's request, he was issued a letter of termination (Defendant Scott's Exhibit 35).

10. The Court finds no evidence of a discriminatory motive in the company's discharge of Mr. Robinson. Mr. Robinson speculated that his complaints to the Personnel Department at the time of the start up of the #11 Paper

Machine that only a few blacks were being assigned to the job and may have in some way caused the company to "take it out on him".[40] The #11 Paper Machine was manned by the company in April 1970, however, one full year before Mr. Clemens began to find significant fault with Mr. Robinson's work performance. Additionally, the Court was not impressed with Mr. Robinson's testimony that no Back Tender had been discharged by Mr. Lang or Mr. Clemens for poor work performance. There were no instances shown that involved the continuous and repeated instances of poor workmanship, etc., as did Mr. Robinson's. Indeed, Mr. Clemens testified that he had issued reprimands to Back Tenders and Machine Tenders for negligent work performance but that none of those instances involved problems of a repeated nature, as did Mr. Robinson's.

The Court cannot conclude that the discipline imposed upon Mr. Robinson was improper. The Court finds that it was in no way motivated by racial discrimination against Mr. Robinson.

Conclusions of Law

1. Scott Paper Company is an employer within the meaning of 42 U.S.C., Section 2000e(b), and is subject to the provisions of 42 U.S.C., Section 1981. *Sanders* v. *Dobbs Houses, Inc.*, 433 F.2d 1097 (5th Cir. 1970); *Caldwell* v. *National Brewing Co.*, 443 F.2d 1044 (5th Cir. 1971); cert. denied 405 U.S. 916 (1972).

2. Defendants United Paper Workers International Union and its Locals 421, 575, 873 and 423 are labor organizations within the meaning of 42 U.S.C., Section 2000e (b), and are subject to the provisions of 42 U.S.C., Section

[40] Defendant Scott's Exhibit 7 shows that at the time of the manning of the #11 Paper Machine there were many members of the affected class that could have successfully bid for the entry jobs in the Department but did not do so.

1981. *Sanders* v. *Dobbs Houses, Inc., supra; Caldwell* v. *National Brewing Company, supra.*

3. The Court has jurisdiction of this cause pursuant to 42 U.S.C., Section 2000e-5(f) and 28 U.S.C., Section 1343(4).

4. The statute of limitation applicable to this action is one year. *United States* v. *Georgia Power Co.*, —— F.2d ——, 5 EPD ¶8460 (5th Cir. 1973); Code of Ala., Title 7, Section 26 (1940) (Recomp. 1958).

5. This case does not involve the legality of the basic organization of jobs into lines of progression or the use of seniority to govern job promotions, although defendant Scott demonstrated the business necessity for these practices. Except for plaintiffs' allegations concerning the selection of maintenance workers and supervisors, none of Scott's present practices are alleged to discriminate against blacks. Rather, this case matter involves only the following narrow question: Has Scott taken enough special, affirmative steps to provide an adequate opportunity for advancement to the minority of its black employees who are still in the historically black (but now fully integrated) jobs to which they were first assigned. Scott's actions are, of course, not even suspect under the applicable law in those many instances where plaintiffs failed to show that such actions have had an adverse impact on the advancement opportunities of any blacks. Even if plaintiffs had met their burden in this respect, Scott successfully showed that in such cases its actions were required by business necessity and were thus permissible. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). The Court concludes that Scott's actions have provided all such affected class employees (except Conclusion 9(d) and 14(d) below) ample opportunity to overcome the present effects of any past discriminations, and Scott is thus in full compliance with the requirements of Title VII of the 1964 Civil Rights Act and 42 U.S.C., Section 1981.

6. While general statistical information may be of value in many types of discrimination cases, *see e. g. Bing* v. *Roadway Express, Inc.*, 444 F. 2d 687, 689 (5th Cir. 1971); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421, 426 (8th Cir. 1970), they are not relevant in such cases as this one, in which the chief question is whether the special steps Scott took to provide a certain number of black employees with new opportunities were legally adequate. Since the Court finds that the opportunities Scott provided were very ample, statistics showing how many affected class members may have actually taken advantage of these opportunities are legally irrelevant.

7. Long ago Scott eliminated the segregated job structure which it inherited when it first acquired the mill. Since then the many affirmative steps it has taken have fully met its legal obligation to eliminate any present effect of past discrimination. *Griggs* v. *Duke Power Co., supra; Local 189* v. *United States*, 416 F. 2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970). By taking the initiative in placing blacks in historically white lines, by restructuring certain lines, and by the other actions it took, Scott successfully provided affected class members with the new opportunities to which the law entitled them. These efforts were climaxed by Scott's adoption of the Memorandum of Understanding which successfully assured the affected class members that their opportunities for advancement at Scott would in no way be limited by any continuing effect of past discrimination.

8. The Memorandum's provisions permitting affected class members to use mill seniority in competing for promotions, rather than job seniority, was based on the standards established in the District Court's original decision in *Local 189* v. *United States*, 282 F. Supp. 39 (E. D. La. 1968), and fully complied with the law's requirement that even racially neutral practices be eliminated or modified if they would otherwise adversely affect the present opportunities of employees who had been the subject of prior discrimination.

9. Plaintiffs have not challenged the legal adequacy of the Memorandum's basic terms. Rather, plaintiffs' contentions are limited to the allegation that in certain details Scott's implementation of the Memorandum was legally inadequate. The Court rejects plaintiffs' contentions in this respect. The Court concludes that Scott's implementation of the Memorandum was entirely reasonable with the exception of (d) below, and fully met Scott's requirements under the law for the following reasons:

(a) Scott informed the affected class of the opportunities available to them under the Memorandum. The individual explanation of the Memorandum Scott gave to all affected class members, in addition to the explanation the company gave from time to time to the leaders of the black unions, were sufficient to apprise all affected class members of the terms of the Memorandum and to put them on reasonable notice of the opportunities available to them. All those who wished to take advantage of the Memorandum's terms were provided more than adequate opportunity to resolve any specific question they might have about how particular terms of the Memorandum applied to them individually.

(b) Scott's rules requiring two affected class members competing against each other for the same promotion to compete on the basis of contract, rather than mill seniority, was both equitable and lawful. Whereas that interpretation may operate to the detriment of one small group for black employees, the interpretation contended for by plaintiffs would have been detrimental to another group of black employees. Therefore, Scott has not practiced racial discrimination by following an interpretation which deterred no more than one or two affected class members from taking advantage of the opportunities available to them.

(c) The provisions Scott made for automatically considering affected class members for vacancies in particular jobs provided the affected class members an ample opportunity (which has been available to them at all times since implementation of the Memorandum) to receive automatic consideration should they wish it. Any other approach would have been utterly unworkable as a practical matter and would have produced chaos in the filling of job vacancies. Scott's conduct in this respect was therefore both reasonable and lawful.

(d) The reduced educational requirements that affected class members wishing to transfer still had to meet under the Memorandum imposed no requirements on blacks that were higher than requirements imposed on whites who were hired at or about the same time and accordingly were not in terms discriminatory. Furthermore, the requirements were not shown to have had an adverse impact on black employees by disqualifying more black than white employees. Finally, Scott's decision to reduce drastically the educational requirements, but not to eliminate them entirely, was justified by business necessity and thus was legal in any event. *Griggs* v. *Duke Power Co.*, *supra*, at 431. However, requiring affected class members who were employed between 1958 and 1963 who have not achieved a high school or GED equivalent level to bid against white employees who were employed at the same time and had to have a high school achievement is discriminating. Obviously, there are whites who were employed prior to 1959 without a high school achievement who are adequately performing their functions. This segment of the affected class is not to be required to have a higher educational level than those whites employed prior to 1959.

(e) Although most employees, black or white, who transfer to a job in a new line must take a cut in pay, and although this has been a common occurrence for many years, the red circling provision contained in the Memorandum

provided most affected class members then in historically black jobs at least one opportunity to transfer without any such reduction in pay. It also provided such employees many other opportunities to transfer without taking as large a cut in pay as they otherwise would have to take. Affected class members who are offered new opportunities to transfer to historically white jobs are not entitled as a matter of law to complete protection, for an indefinite length of time, from having to take any temporary cut in pay. The protection thus afforded affected class members was as great as the law can reasonably require.

(f) Scott has already reorganized its lines of progression whenever it was feasible to do so. Since affected class members now have adequate opportunities to overcome any present effect of past discrimination there is no need for Scott to restructure lines of progression any further, or to institute special provisions for job skipping or advance level entry. Furthermore, the present job structures are required by business necessity, and thus would be legal even if plaintiffs had proved (which they did not) their allegation that the present job structure discriminates against a few members of the affected class who have chosen to stay in historically black (though now fully integrated) jobs or lines of progression.

10. The law requires Scott to give affected class members only one opportunity to take advantage of the special provisions available to them. *United States* v. *Hayes International Corp.*, 456 F. 2d 112 (5th Cir. 1972). Scott's actions have more than met this requirement by providing affected class members innumerable opportunities to take advantage of the benefits provided by the Memorandum. Scott's otherwise lawful conduct is therefore not rendered illegal because a certain number of the affected class have chosen, for reasons unrelated to race, not to take advantage of the opportunities. Nor is Scott's otherwise lawful conduct rendered illegal because other affected class members may have failed to exercise the minimal initiative

necessarily required of employees in any program which does not force employees to transfer to new jobs, but only provides them with opportunities to do so.

11. Scott has not discriminated against black employees in the selection of Maintenance Department Journeymen. Scott's procedures in this regard were not shown to have had a racially discriminatory effect and in any event were shown by Scott to be reasonable and justified by business necessity.

12. Scott has not discriminated against black employees in the selection of Maintenance Department Craft Helpers. In 1963 Scott took the affirmative action of placing a black in the Maintenance Department. This sufficiently eliminated any continuing psychological barriers to transfers by blacks to the Department, other barriers having been previously eliminated by Scott. Since then it has applied only racially neutral criteria required by business necessity in filling such vacancies. The requirement that applicants for those vacancies have a high school education was not shown to have an adverse impact on blacks by eliminating disproportionately more blacks than whites, and thus the requirement was legal, whether or not it was required by business necessity. Nevertheless, Scott did prove that the requirement was required by business necessity because a high school education greatly increases the likelihood that the applicant's intelligence, learning ability, and persistence will be adequate to assure successful completion of the approximately four years of training required to become a Journeyman. Such a justification for a high school requirement, which relies on a high school diploma for far more than simply evidence that an employee can read and write, is an entirely valid one under the law.

13. During the period applicable to this suit, Scott has used only the Wonderlic and, later, the three-test battery —Bennett Mechanical, Purdue Non-Language, and Perceptual Speed—to screen applicants for vacancies in Maintenance Craft Helper jobs. The statistics plaintiffs produced showing the difference in test scores between blacks and whites were too insubstantial to show that the tests had an adverse impact on blacks. *Ochoa* v. *Monsanto Co.*, — F. 2d —, 5 EPD Paragraph 8437 (5th Cir. 1973). Because plaintiffs failed to prove that either the Wonderlic or the battery had an adverse impact on blacks, there can be no question but that the tests are legal.

14. Plaintiffs' failure to show that the tests have an adverse impact on blacks removed the need for Scott to show that the tests were justified by business necessity, and thus valid despite any adverse impact they may have. Nevertheless, Scott proved the tests were valid predictors of applicants' ability to perform the job applied for, and thus justified by business necessity.

(a) When Scott began using the Wonderlic test it did so on advice of the Office of Federal Contract Compliance (OFCC), an agency of the U.S. Department of Labor that has specific responsibility for enforcement of Executive Order 11246, which prohibits racial discrimination in employment by Government contractors. OFCC advised that Wonderlic had been found valid, notably in studies done at the International Paper Co. paper mill which borders Scott's facilities in Mobile.

(b) Scott proved that the battery it now employs has been proved by a study conforming with all legal requirements to be a predictor of successful job performance. While other testing experts might have performed certain aspects of the study differently, the study was a professionally competent study conducted by a recognized expert in the field, Dr. William E. Scott, Jr. Plaintiffs' contention that in certain technical matters another expert might have acted a little differently was legally immaterial for, even if true, the criticism would not alter the study's basic conclusion that the tests were valid. In any event, the Court concludes that the specific methodology used in the

study was professionally sound and reasonable, and therefore its reliability is beyond question. As the Court pointed out in *United States* v. *Georgia Power, supra,* at pp. 7245-46, the study's conclusions are legally valid in such circumstances even if it did not happen to conform in all details to particular governmental guidelines, for such guidelines are intended as just that, guidelines rather than rigid rules. In particular, the Court finds that the study was professionally sound and legally valid in the following areas in which its validity was challenged by plaintiffs:

(i) Dr. Scott thoroughly analyzed the jobs involved in the test through extensive, informed observations. He obtained as wide a sample of employees from the job classifications under study as was possible without fatally prejudicing the test's reliability by coercing employees to take the test. His decision to combine employees from different crafts was justified by extensive evidence that these different crafts possessed very similar underlying aptitudes. In all these respects the evidence showed that the methodology was professionally sound and at least as certain to produce accurate results as any feasible alternative method proposed by plaintiffs.

(ii) Use of the chi-squared method and the Yates correction in comparing test scores with supervisor ratings was a professionally sound practice, and there was no evidence that use of the Pearson production moment correlation method would have significantly altered the results of the study.

(iii) In light of the absence of enough black Maintenance Craft employees to make up an acceptable sample (in statistical terms), it was not technically feasible to develop validation data separately for black employees, and Scott was not required in its study to do so. Furthermore, the evidence failed to show that the hypothesis of differential validity was even a professionally valid one.

(iv) Dr. Scott's report of the study to the company conformed with all legal guidelines available at the time. So long as the study itself is shown by the evidence to be professionally sound, the law does not require that the results of the study be reported by the expert to his client in any particular form, especially since professional standards do not require a particular type of report and where, as here, the expert has maintained a continuing relationship with the company.

(v) The extent of the statistical relationship shown to exist by the valid study between an employee's test score and his job performance was sufficient to justify the conclusion that the test had been validated. The degree of correlation established was within the standards set by the American Psychological Association. In light of this fact, and the further fact that evidence showed the extent of the correlation to be even higher than that suggested by the statistical results, the results fully met the flexible standards established by the law in this area. See *United States* v. *Georgia Power Co., supra,* at p. 7246.

(vi) The Court similarly rejects the remaining technical criticisms leveled against the study by plaintiffs on the grounds that they were not shown to be clearly valid criticisms and that even if they were well-founded they would not have altered the study's ultimate conclusion that the tests were valid.

(c) Scott has demonstrated the validity of the Scott battery at least to the extent that the present state of the art permits. Also, Dr. Scott is making a continuing study of the further validation data the company has been gathering since it began using the tests. Inasmuch as the battery has been shown to be the best tests available, Scott is acting lawfully in continuing to use the tests while the study continues.

(d) Disqualification of affected class members by usage of a test that has not been validated prior to the installation of a valid test is discriminating.

15. Scott does not discriminate against blacks in selecting hourly employees for first-line supervisory jobs. The highest level officials at Scott makes the selection in accordance with objective standards. The qualifications Scott requires of candidates for supervisory positions are reasonable and were shown to be required by business necessity. First-line Supervisors do not have the ability to control who is selected for the supervisory jobs. All employees interested in such jobs are provided ample opportunity to learn about the openings and to express interest in the jobs. Scott's conduct thus conforms with the standards established in *Rowe* v. *General Motors Corp.*, 457 F. 2d 348 (5th Cir. 1972).

16. Scott was not shown to have acted in a racially discriminatory manner when it took disciplinary action against Mr. Will Robinson. Rather, the action taken by Scott was fully justified by the repeated instances of negligent work performance by Mr. Robinson.

17. Plaintiffs failed to show that Scott's alleged discriminatory conduct was intentional, as required by the law. Section 706(g) of the Civil Rights Act of 1964, as amended, 42 U.S.C., Section 2000e-5(g) provides that:

> "If the court finds that the respondent has *intentionally* engaged in, or is *intentionally* engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative relief as may be appropriate . . ." (emphasis added).

(a) The Court of Appeals for the 5th Circuit has said that "the requisite intent may be inferred from the fact that the defendants persisted in the conduct after its racial

implications had become known to them." *Local 189* v. *United States, supra,* 416 F. 2d at 997. In other words, defendants may not apply a policy which is racially neutral on its face without regard to the actual discriminatory consequences of such action.

(b) Scott is not accused of truly "intentional" conduct. It is also not accused of following racially neutral practices without regard to their present impact in light of past discrimination. Instead, this suit is almost entirely concerned with only the Memorandum which Scott adopted, the validation study it ordered, and the other actions it adopted with the specific and sole intent of thereby eliminating any lingering discrimination.

(c) Scott did not actually intend to discriminate, and the necessary discriminatory intent cannot be inferred from the fact that Scott continued its same course of conduct after having had a chance to observe its effect. With respect to the tests, there was no evidence, such as comparative test scores, on which Scott could reasonably conclude that the tests were having a discriminatory effect, while there was extensive, professionally gathered evidence that the tests were, in fact, nondiscriminatory. In respect to Scott's adoption and implementation of the Memorandum, authoritative legal and administrative precedents reasonably led Scott to believe the provisions would be and were effective to eliminate present effects of past discrimination. Scott also reasonably concluded that whatever detrimental effect the Memorandum may have had on a few affected class members was necessary to avoid an equally detrimental effect on other affected class members.

(d) Further, no evidence was brought to Scott's attention, subsequent to its adoption of the Memorandum, that those affected class members who did not take advantage of the Memorandum failed to do so because of any inadequacy of the terms of the Memorandum.

(e) Since Scott's actions were in fact clearly intended to eliminate not only present discrimination but also all present effects of long-abandoned past discrimination, and since Scott was never apprised that these actions had had any discriminatory impact (if they had any), it is impossible to infer discriminatory intent. Consequently, Scott's conduct cannot be said in any respect to be intentional, and thus its actions were not in violation of the law.

18. Since the evidence did not show that Scott had in fact discriminated against blacks, plaintiffs are, of course, not entitled either individually or as a class to any back pay award. Even if plaintiffs had successfully proved discrimination, however, the evidence did not show either an actual or constructive intent to discriminate against blacks; any discrimination instead arose only as an accidental and limited by-product of Scott's good faith and highly successful efforts to remove the remaining effects of past discriminatory practices. Under such special circumstances, the Court will not in any event exercise the discretionary power Title VII confers on it to award back pay. *LeBlanc* v. *Southern Bell Tel. & Tel. Co.*, 460 F. 2d 1229 (5th Cir. 1973); *United States* v. *Georgia Power Co., supra,* at p. 7251.

JUDGMENT

In accordance with the above Findings of Fact and Conclusions of Law it is the opinion of the Court that the plaintiffs have proven but two issues out of a multitude of allegations and are only entitled to the following relief:

It is therefore Ordered, Adjudged and Decreed that those members of the affected class employed between 1958 and 1963 who have not achieved a high school or GED educational level will be considered for promotion, transfer or advancement on the same educational basis or standard which existed for the affected class members employed prior to 1959; and

It is further Ordered that those members of the affected class who may have been disqualified for transfer to Maintenance as a result of their failure to pass the Kopas or Wonderlic tests may request and must be permitted to take the current Scott battery of tests for further consideration for transfer; and

It is further Ordered that costs and attorneys' fees reasonably incurred in the prosecution of this litigation shall be taxed against defendant, Scott Paper Company. Defendant, United Paperworkers International Brotherhood of Pulp, Sulphite and Paper Mill Workers shall bear its own costs and attorneys' fees; and

It is further Ordered that plaintiffs and defendant, Scott Paper Company, shall have thirty (30) days from the date of this order in which to attempt to reach an agreement as to the amount of such attorneys' fees, failing in which they will certify such fact to the Court at which time a hearing will be held for proof of same.

APPENDIX C

CIVIL RIGHTS ACT OF 1964

Section 703, 42 U.S.C. § 2000e-2:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

• • •

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of

such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Section 706, 42 U.S.C. § 2000e-5:

• • •

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires.

Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

• • •

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge.

In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involv-

ing a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

• • •

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

APPENDIX D

Executive Order 11246

EQUAL EMPLOYMENT OPPORTUNITY

Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

• • •

PART II—NONDISCRIMINATION IN EMPLOYMENT BY GOVERNMENT CONTRACTORS AND SUBCONTRACTORS

Subpart A—Duties of the Secretary of Labor

SEC. 201. The Secretary of Labor shall be responsible for the administration of Parts II and III of this Order and shall adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof.

Subpart B—Contractors' Agreements

SEC. 202. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

"During the performance of this contract, the contractor agrees as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termina-

tion; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

"(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

"(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advertising the labor union or workers' representative of the contractor's commitment under Section 202 of Executive Order No. 11246 of Sept. 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

"(4) The contractor will comply with all provisions of Executive Order No. 11246 of Sept. 24, 1965, and the rules, regulations, and relevant orders of the Secretary of Labor.

"(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of Sept. 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contacting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

"(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with

any of such rules, regulations, or orders, this contract may be cancelled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of Sept. 24, 1965, and such other sanctions may be imposed and remedies involved as provided in Executive Order No. 11246 of Sept. 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

"(7) The contractor will include the provisions of Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of Sept. 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: *Provided,* however, That in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

SEC. 203. (a) Each contractor having a contract containing the provisions prescribed in Section 202 shall file, and shall cause each of his subcontractors to file, Compliance Reports with the contracting agency or the Secretary of Labor as may be directed. Compliance Reports shall be filed within such times and shall contain such information as to the practices, policies, programs, and employment policies, programs, and employment statistics of the contractor and each subcontractor, and shall be in such form, as the Secretary of Labor may prescribe.

• • •

Subpart C—Powers and Duties of the Secretary of Labor and the Contracting Agencies

SEC. 205. Each contracting agency shall be primarily responsible for obtaining compliance with the rules, regulations, and orders of the Secretary of Labor with respect to contracts entered into by such agency or its contractors. All contracting agencies shall comply with the rules of the Secretary of Labor in discharging their primary responsibility for securing compliance with the provisions of contracts and otherwise with the terms of this Order and of the rules, regulations, and orders of the Secretary of Labor issued pursuant to this Order. They are directed to cooperate with the Secretary of Labor and to furnish the Secretary of Labor such information and assistance as he may require in the performance of his functions under this Order. They are further directed to appoint or designate, from among the agency's personnel, compliance officers. It shall be the duty of such officers to seek compliance with the objectives of this Order by conference, conciliation, mediation, or persuasion.

SEC. 206. (a) The Secretary of Labor may investigate the employment practices of any Government contractor or subcontractor, or initiate such investigation by the appropriate contracting agency, to determine whether or not the contractual provisions specified in Section 202 of this Order have been violated. Such investigation shall be conducted in accordance with the procedures established by the Secretary of Labor and the investigating agency shall report to the Secretary of Labor any action taken or recommended.

(b) The Secretary of Labor may receive and investigate or cause to be investigated complaints by employees or prospective employees of a Government contractor or subcontractor which allege discrimination contrary to the contractual provisions specified in Section 202 of this Order. If this investigation is conducted for the Secretary of

Labor by a contracting agency, that agency shall report to the Secretary what action has been taken or is recommended with regard to such complaints.

• • •

SEC. 208. (a) The Secretary of Labor, or any agency, officer, or employee in the executive branch of the Government designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, as the Secretary may deem advisable for compliance, enforcement, or educational purposes.

(b) The Secretary of Labor may hold, or cause to be held, hearings in accordance with Subsection (a) of this Section prior to imposing, ordering or recommending the imposition of penalties and sanctions under this Order. No order for debarment of any contractor from further Government contracts under Section 209(a)(6) shall be made without affording the contractor an opportunity for a hearing.

Subpart D—Sanctions and Penalties

SEC. 209. (a) In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or adopt, the Secretary or the appropriate contracting agency may:

(1) Publish, or cause to be published, the names of contractor or unions which it has concluded have complied or have failed to comply with the provisions of this Order or of the rules, regulations, and orders of the Secretary of Labor.

(2) Recommend to the Department of Justice that, in cases in which there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in Section 202 of this Order, appropriate proceedings be brought to enforce these provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals, or groups

who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the provisions of this Order.

(3) Recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under Title VII of the Civil Rights Act of 1964.

(4) Recommend to the Department of Justice that criminal proceedings be brought for the furnishing of false information to any contracting agency or to the Secretary of Labor as the case may be.

(5) Cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with the nondiscrimination provisions of the contract. Contracts may be cancelled, terminated, or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the contracting agency.

(6) Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry out personnel and employment policies in compliance with the provisions of this Order.

(b) Under rules and regulations prescribed by the Secretary of Labor, each contracting agency shall make reasonable efforts within a reasonable time limitation to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion before proceedings shall be instituted under Subsection (a) (2) of this Section, or before a contract shall be cancelled or terminated in whole or in part under Subsection (a) (5) of this Section for failure of a contractor

or subcontractor to comply with the contract provisions of this Order.

• • •

SEC. 211. If the Secretary shall so direct, contracting agencies shall not enter into contracts with any bidder or prospective contractor unless the bidder or prospective contractor has satisfactorily complied with the provisions of this Order or submits a program for compliance acceptable to the Secretary of Labor or, if the Secretary so authorizes, to the contracting agency.

SEC. 212. Whenever a contracting agency cancels or terminates a contract, or whenever a contractor has been debarred from further Government contracts, under Section 209 (a) (6) because of noncompliance with the contract provisions with regard to nondiscrimination, the Secretary of Labor, or the contracting agency involved, shall promptly notify the Comptroller General of the United States. Any such debarment may be rescinded by the Secretary of Labor or by the contracting agency which imposed the sanction.

• • •

PART IV—MISCELLANEOUS

SEC. 401. The Secretary of Labor may delegate to any officer, agency, or employee in the Executive branch of the Government, any function or duty of the Secretary under Parts II and III of this Order, except authority to promulgate rules and regulations of a general nature.

• • •

SEC. 405. This Order shall become effective 30 days after the date of this Order.

LYNDON B. JOHNSON

THE WHITE HOUSE,
September 24, 1965.

Supreme Court, U. S.
FILED
SEP 2 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-121

SCOTT PAPER COMPANY,

Petitioner,

v.

ELIGH WATKINS, et al.

BRIEF IN OPPOSITION

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IN THE

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SCOTT PAPER COMPANY,

Petitioner,

v.

ELIGH WATKINS, et al.

BRIEF IN OPPOSITION

Jurisdiction

The jurisdiction requisites are adequately set forth in the petition.

Question Presented

Would it frustrate the central statutory purposes of Title VII if an employer found guilty of pervasive, class-wide, racial discrimination were totally absolved of back pay liability to individual discriminatees because the Office of Federal Contract Compliance (OFCC) had required the employer to agree to a seriously inadequate and incomplete remedial plan, which plan the employer executed in a manner so as to render it virtually useless?

Supplemental Statement of the Case

Until 1963, jobs at the Scott Paper Company's ("Scott" or the "Company") Mobile, Alabama facilities were strictly

segregated by race[1] (A. 2).[2] Blacks were confined to the lowest paid most menial positions. Whites were assigned to the better paying jobs.[3] Not until 1965 did Scott begin to assign newly hired black employees to traditionally all-white hourly wage production jobs (A. 3, 82-85). However, the over three hundred black employees hired previously were effectively barred from the better paying white jobs by newly instituted formal transfer requirements created by Scott to mark the occasion of desegregation. Employees seeking to transfer into formerly white line of progression production jobs were, for the first time, required to possess a high school education, pass an unvalidated aptitude test and be under age 36 (A. 3-4, 84-85). Predictably, by 1969, only seven[4] of the black employees hired prior to 1963 successfully negotiated these new transfer requirements. Even those few who were able to enter previously all-white jobs were "locked" into inferior positions by the familiar job and departmental seniority system which prevented them from catching up to their white contemporaries. See *Local 189* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied* 397 U.S. 919 (1970).

At the behest of OFCC, Scott, in 1969, agreed to effect certain seniority and job qualification changes in its em-

[1] The pattern of formal racial segregation practiced by Scott was substantially the same as those this Court reviewed in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975).

[2] The form of citation A. .... refers to the page in the appendix to this petition filed by petitioner Scott.

[3] All salaried, supervisory, maintenance craft and most production line of progression jobs were reserved for white employees (A. 2-3, 78-81, 113).

[4] Scott states that by 1969 one-third of the 300 affected class of black employees were in formerly all-white jobs (Pet. p. 5). In addition to the seven blacks who actually transferred into previously all-white lines of progression, the job classifications of other previously segregated blacks were tacked onto the bottom of certain white lines of progression. This as well as the inclusion of some post-1963 black hirees explains why one-third of the affected class were in previously all-white jobs by 1969 (A. 3, 87, 91).

ployment practices which were intended to allow its previously segregated black employees to reach their "rightful place." OFCC did not address and Scott did not undertake to change the aptitude tests and high school requirements that continued to exclude blacks from maintenance helper jobs.[5] Following a consistent practice,[6] OFCC did not seek back pay or other financial restitution for the class of discriminatees (A. 90, Scott's Exhibit 3).

The Memorandum of Understanding ("Memorandum") between Scott and OFCC merely set out the broadest outlines of the relief to be accorded the victims of longstanding racial discrimination at Scott's Mobile mill, and left Scott with broad and virtually unfettered discretion as to its implementation. Thus, the accomplishment of its "rightful place" objectives depended entirely on how the Company fleshed out its new seniority rules and qualification requirements and how it actually made transfer opportunities available to discriminatees. It is, therefore, crucial to consideration of Scott's petition that after an exhaustive review of a lengthy record the Court of Appeals found as a matter of fact that the way Scott implemented the Memorandum made it a "useless gesture" [7] (A. 10). Understandably, the Company has not sought review of this devastating finding here.[8]

[5] Additionally, neither party to the agreement addressed the standardless procedures utilized by Scott's all-white management which resulted in the exclusion of blacks from salaried supervisory positions.

[6] See fn. 14, *infra*.

[7] Predictably, at the time of trial in 1972, black employee earnings lagged far behind that of whites. The affected class averaged a whopping $1.00 per hour less than their white contemporaries (A. 2-3).

[8] Respondents are somewhat confounded by a suggestion in the petition that the appellate findings of improper implementation of the Memorandum may not be allowed to stand (Pet. 14). It is our contention that even if "Scott vigorously disagrees" with them (Pet. 14, n.14), these rulings do not present questions subsidiary to or fairly comprised in the single question presented in the jurisdictional statement of the petition. See Supreme Court Rule 15(c).

In the Court of Appeals only the union appellees argued, as the Company's petition now urges, that OFCC's sponsorship of the Memorandum of Understanding somehow insulates them from back pay liability.

Reasons for Denying the Writ

While petitioner's question presented asks only for review of an issue recently disposed of in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), petitioner in its argument raises an issue not yet reached in the district court. We deal with the latter first and then respond to the *Moody* issue.

The Extent to Which the Defendants May Invoke the OFCC Sponsored Memorandum to Avoid Back Pay Is Not Ripe for Review

The district court found both that Scott had not in fact discriminated against blacks and that even if it had the Company's "good faith" warranted denial of back pay to all members of the plaintiff class (A. 158). The Court of Appeals found that Scott unlawfully discriminated against the class both prior to and after it entered into the agreement with OFCC. Additionally, as Scott correctly asserts here, it held that "OFCC's involvement is not a reason to deny back pay to the plaintiff class"[9] (Pet. 6). That holding does not, as petitioner suggests,[10] require a back pay

[9] Respondents do not agree that the Fifth Circuit so ruled *as a matter of law.* The decision was based on findings of both fact and law (A. 66).

[10] For example, Scott closes its argument with this revealing assertion:

> [S]uch matters as whether particular employees understood their rights and whether Scott properly implemented the Memorandum in specific situations might give rise to *individual* back pay claims in particular instances but not to back pay relief to the *entire* class.

Pet. 14 (emphasis added).

award to every class member regardless of the merits of his individual case. The Fifth Circuit as well as every other circuit that has addressed this subject has never established such a blanket rule. See, *e.g., United States* v. *United States Steel Corp.,* 520 F.2d 1043 (5th Cir. 1975); *EEOC* v. *Detroit Edison Co.,* 515 F.2d 301 (6th Cir. 1975); *Rock* v. *Norfolk & Western Ry. Co.,* 532 F.2d 336 (4th Cir. 1975). Instead, the courts of appeals have prescribed a two-step procedure for Title VII class actions where class-wide issues are resolved at stage I and individual claims are addressed at stage II. *E.g.,* see *United States* v. *United States Steel Corp.,* 520 F.2d 1043, 1052-57 (5th Cir. 1975). It is at stage II that the equities of individual entitlements to back pay are determined. It is at that stage that Scott may seek to prove that an individual class member is not entitled to back pay because he knowingly and inexcusably passed up opportunities made available to him, that his award should be reduced because of the actual effects of the Memorandum on his advancement, or by establishment of some other defense not foreclosed by the court of appeals. See *United States* v. *United States Steel Corp., supra.* Accord, *Baxter* v. *Savannah Sugar Refining Corp.,* 495 F.2d 437, 443-444 (5th Cir. 1974). This approach follows the teachings of this Court. See *Franks* v. *Bowman Transportation Co., Inc.,* —— U.S. ——, 47 L.Ed.2d 444, 466 (1976); *Albemarle Paper Co.* v. *Moody, supra.*

Since stage II has not yet been reached in the district court, there is no way the Court can review the extent to which Scott may rely on the Memorandum of Understanding to limit its financial liability for the racial discrimination it has been found guilty of. Denial of certiorari would remit this issue to the trial court, where it belongs.

The Court of Appeals' Holding Presents No Novel or Unsettled Issues

Although it tries to hedge on the point,[11] the petition clearly suggests that the Court of Appeals should have left the district court free to decide not to award back pay solely on the grounds that OFCC had "imposed a specific remedial plan" and that the black employees (through the all-black local union) had "knowingly and voluntarily consented to that plan" (Pet. 12).

Scott has not sought review of the Court of Appeals' ruling that virtually all of its employment practices challenged by the black plaintiffs were in flagrant violation, not only of Title VII, but of the Memorandum of Understanding itself. Therefore, Scott's petition comes to this Court in the following posture: Assuming, as is not the case here, that Scott had complied with the Memorandum,[12] should the courts consider OFCC sponsorship of The Memorandum as grounds for denying generally an award of back pay where the Memorandum on its face failed to provide discriminatees with all of the relief required by Title VII?[13]

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[11] For example, Scott disavows any assertion that OFCC's involvement "precludes an award of back pay to individuals who show that through no fault of theirs they could not benefit from [the memorandum of understanding]" (Pet. 8). We have shown in the preceding section of our argument that under the appellate ruling now remanded to the district court this inquiry is still very much open to the parties. Consequently, the question presented by the petition is premature.

[12] The Court of Appeals detailed the manner in which Scott failed to comply with the Memorandum. It failed to implement it promptly, thus rendering its limited "red circling" provisions ineffective (A. 19-22), concocted a "least educated white man" rule (A. 11, 30-33), invented a "blocking" policy (A. 22-25), executed the automatic consideration provision in a manner designed to eliminate most affected class members from benefiting from the provisions of the Memorandum (A. 10-19), failed to develop job-skipping and advanced level entry opportunities contemplated by the Memorandum (A. 40), and simply failed to correctly inform the affected class of their new rights (A. 10-19).

[13] See p. 3, *supra*.

Had this issue not been resolved by *Albemarle Paper Co.* v. *Moody, supra,* this would hardly be the appropriate case for this Court to address it because the petitioner does not challenge the Court of Appeals' finding that the Company so violated the understanding it had reached with OFCC so as to render it a "useless gesture" (A. 10). Further, every appellate court that has considered defenses invoking OFCC approval of similar remedial schemes in the paper industry have been unimpressed.[14] *E.g., Stevenson* v. *International Paper Co.,* 516 F.2d 103 (5th Cir. 1975); *Rogers* v. *International Paper Co.,* 510 F.2d 1340, 1354, n.36 (8th Cir. 1975). See also *Boles* v. *Union Camp Corp.,* 350 F. Supp. 632 (S.D. Ga. 1972).

We submit that even in its hypothetical form the question presented by petitioners has already been answered in the negative by *Albemarle Paper Co.* v. *Moody, supra; Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974); and other Title VII decisions of this Court. Scott's petition is nothing more than an attempt to reargue *Albemarle Paper Co.* v. *Moody* by implicating a federal agency in its half-hearted compliance with presidential executive orders.[15]

Both Congress and this Court have already declared that the victims of discrimination should be made whole. See *Albemarle Paper Co.* v. *Moody, supra,* 405 U.S. at 421. The petition does not deny that the Act's compensatory function would be frustrated by the result Scott seeks. Nor is it resurrecting the discredited defense of good faith, the Company lamely insists (Pet. 11). Rather, petitioner's primary argument is that inability to shield themselves

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[14] This is not surprising since OFCC has no statutory authority to interpret or enforce Title VII. See pp. 9-10, *infra.* Further, in exercising its authority under Executive Order 11246, OFCC has *never* required federal contractors to award back pay to discriminatees. See Federal Civil Rights Enforcement Effort—1974, a report of the U. S. Commission on Civil Rights, Vol. 5, p. 242 (1975).

[15] OFCC has been criticized generally for its failure to agressively execute its mandate. See U. S. Commission on Civil Rights report, *supra,* at pp. 298, 342.

from class back pay with an OFCC-approved affirmative action plan "would sharply reduce employers' incentive to follow, without litigation, government-proposed remedies . . . ." (Pet. 7). This is so, Scott suggests, because Title VII's purpose of wiping out discrimination nationwide can only be served through conciliation, and there is no incentive for employers to conciliate if they have to pay money. This Court has rejected the Company's rationale on both its predicates. Congress never intended that the parallel and overlapping remedies it provided for remedying discrimination should operate to restrict the victim's access to relief. The opposite is true. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). And given the objective of encouraging conciliation, *Moody* squarely rejects Scott's contention that exposing employers to class back pay would discourage conciliation. To the contrary:

> "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide(s) the spur or catalyst which causes employers and unions to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."

405 U.S. at 417-18, quoting *United States* v. *N.L. Industries*, 479 F.2d 354, 379 (8th Cir. 1973). Perhaps there is no better illustration of this lesson than the cavalier treatment Scott afforded black employees under the toothless Memorandum of Understanding. Would the petitioner have dared to toss off the job-skipping requirement of the Memorandum or concoct a "least-educated-white-man" rule if it knew it would have to pay for such open violations of Title VII? It is far more probable, if Scott's position were adopted, that most employees would hasten to obtain the most unobtrusive and inexpensive arrangement possible

with the least aggressive federal agency.[16] The rights of discriminatees would literally go up for auction.

But even if Scott's position about the disincentives to conciliation were plausible, it would still run afoul of this Court's teaching under Title VII. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975) recognized that the independent court remedies afforded discriminatees by Congress may in some cases "tend to deter efforts at conciliation [and] weaken the [Equal Employment Opportunity] Commission's efforts to induce voluntary compliance." 421 U.S. at 461. But this Court deemed the choice "a valuable one," and said it was Congress' prerogative to resolve or not the conflicting legislative policies. 421 U.S. at 461.

In fact, Congress has established "a comprehensive scheme" in Title VII, *Johnson* v. *Railway Express Agency, Inc., supra,* 421 U.S. at 458, and part of it is an explicit means for employers to establish a "good faith" defense by obtaining the blessing of the EEOC.[17] 42 U.S.C. § 2000e-12(b).[18] Beyond this statutory method an employer

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[16] Conversely, no responsible agency would enter into any agreement providing less than full restitution if it knew the employer could use it as a defense to complete relief in court.

[17] OFCC and other federal compliance agencies, of course, have no statutory authority to interpret or enforce Title VII, and even the procedure for seeking EEOC interpretation of Title VII is narrowly restricted by appropriate precautions. See *Local 189* v. *United States, supra*, 416 F.2d at 997; *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 801 (4th Cir. 1971).

[18] That section states:

> (b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this title if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Com-

who violates Title VII is not entitled to obtain financial exculpation from a federal agency. *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 444 (J. Rehnquist concurring).

There is absolutely no basis, therefore, for petitioner's assertion that it "had every reason to believe that it need not fear an award of class-wide back pay" if it followed the Memorandum of Understanding[19] (Pet. 10) (except, of course, to the extent the Memorandum actually relieved financial injury to black employees).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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mission issued under this title regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this title.

[19] Indeed, OFCC regulations implementing the Executive Order specifically state that:

> The regulations in this part do not apply to any action taken to effect compliance with employment practices subject to Title VII of the Civil Rights Act of 1964. 41 C.F.R. § 60-1.1.